Supreme Court, U.S.
FILED

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No.

In The

Supreme Court of the United States

GRID RADIO and JERRY SZOKA,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,

Respondents.

Petition for Writ Of Certiorari To The
United States Court Of Appeals
For The D.C. Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Must a licensing scheme's unconstitutionality be "indisputably" clear under prior Supreme Court decisions before a speaker may rely on its unconstitutionality as a defense against large fines and other punishment for speaking without a license?

2. Did the FCC's microbroadcasting ban, which barred anyone from obtaining a license to broadcast with a power of less than 100 watts, violate the First Amendment?

LIST OF PARTIES

Pursuant to Supreme Court Rule 14.1(b), the parties to this proceeding are:

Petitioners:

Jerry Szoka and Grid Radio, which is wholly owned by Jerry Szoka and has no parent companies or subsidiaries.

Respondents:

The Federal Communications Commission, the United States, and the National Association of Broadcasters.

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PETITION FOR WRIT OF CERTIORARI

Petitioners Grid Radio and Jerry Szoka respectfully petition for a writ of certiorari to review the decision of the Court of Appeals in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. A1-A16) is reported at 278 F.3d 1314. The opinion of the Federal Communications Commission (Pet. App. A17-A35) is reported at 14 FCC Rcd. 9857, 1999 WL 386918.

JURISDICTION

The judgment of the Court of Appeals was entered on February 8, 2002. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). The Court of Appeals had jurisdiction under 47 U.S.C. § 402(b)(7), 28 U.S.C. § 2342(1), and 47 U.S.C. § 402(a).

STATUTES AND REGULATIONS INVOLVED

In addition to the First Amendment to the United States Constitution, this case involves the regulations comprising the FCC's microbroadcasting ban, which are set forth in full at Pet. App. A105-A112.

STATEMENT OF THE CASE

This case involves the FCC's microbroadcasting ban, which prohibits radio stations from operating with less than 100 watts. Jerry Szoka was fined $11,000 for operating Grid Radio, a microbroadcasting station, without a license. Szoka could not obtain a license because at the time he was operating Grid Radio, the FCC refused to

issue any microbroadcasting licenses.

Judges and commentators have questioned whether the ban violates the First Amendment. The D.C. Circuit did not answer that question, because it held that (at least in the broadcast context) a licensing scheme must be "indisputably unlawful or unconstitutional" under prior Supreme Court decisions before a speaker may rely on its unconstitutionality as a defense against punishment for speaking without a license. *Grid Radio v. FCC*, 278 F.3d 1314, 1316, 1321 (D.C. Cir. 2002) (Pet. App. A2, A12).

Applying that standard, the court held that it would be "inappropriate for us to consider [Szoka's] challenge to the microbroadcasting ban absent 'an indisputable indication'" that the ban was unconstitutional "because of the reasoning of a Supreme Court decision." It refused to consider Szoka's constitutional challenges because it felt that none of them "clear[ed] this high bar." *Id.* at 1321 (Pet. App. A12).

A. Preliminary Statement

Jerry Szoka began operating Grid Radio on an empty frequency in Cleveland, Ohio, in September, 1995. He did not apply for an FCC license because the Commission imposed a regulatory ban on small FM stations in 1978. Szoka argued that this ban on small stations (also called "microradio" or low-power FM, LPFM) was an unjustified prior restraint in violation of the First Amendment. *See Grid Radio v. FCC*, 278 F.3d at 1317 (Pet. App. A3).

The Commission imposed a cease-and-desist order and an $11,000 forfeiture against Szoka for his unlicensed

microbroadcasts. *In re Jerry Szoka*, 14 FCC Rcd 9857, 1999 WL 386918 (F.C.C. June 15, 1999) (Pet. App. A17-A35). Even as the FCC was proceeding against Szoka, microbroadcasters were successfully challenging the ban through rulemaking proceedings. *In re Creation of a Low-Power FM Radio Service*, 14 FCC Rcd 2471, 1999 WL 46878 (Feb. 3, 1999), *rule modification granted*, 15 FCC Rcd 2205, 2000 WL 85304, 2000 FCC Lexis 395 (Jan. 28, 2000), *decision clarified on reconsideration*, 15 FCC Rcd 19208 (Sept. 28, 2000), *regulation modification granted*, 2001 WL 310997 (Apr. 2, 2001).

The Commission nevertheless sought enforcement of the cease-and-desist order in the Northern District of Ohio. Following an evidentiary hearing, that court concluded that the microbroadcasting ban was likely unconstitutional, but that it lacked the inherent equitable authority to refuse the Commission's request for an enforcement injunction, which it issued effective March 1, 2000. *United States v. Szoka*, No. 1:99CV2008, Memorandum & Order (N.D. Oh. Feb. 24, 2000). The Sixth Circuit affirmed the injunction. *United States v. Szoka*, 260 F.3d 516 (6th Cir. 2001) (Pet. App. A44-A72).

Meanwhile, Szoka appealed both the $11,000 forfeiture, and the FCC's cease-and-desist order, to the D.C. Circuit, which affirmed those orders as well. *Grid Radio v. FCC*, 278 F.3d 1314 (D.C. Cir. 2002) (Pet. App. A1-A16).

B. The Rise and Fall of the Ban on Microbroadcasting

Before 1978, individuals wishing to start low-power educational radio stations could do so by obtaining a Class D license from the FCC. The FCC grants FM

broadcast licenses under four separate classifications (Class A, B, C, and D) which depend upon factors such as transmission power, antenna height, and the area or place from which the broadcast is emanating. 47 C.F.R. § 73.210, *et seq.* Class D licenses were traditionally allocated to microbroadcast stations that operated at a power level of less than 100 watts and retained an approximate reception area of between two to twelve miles radius from the point of transmission.

In 1978, however, the FCC forbade the issuance of all future Class D licenses. *See* 47 C.F.R. § 73.211(a) (FM stations must operate with a minimum effective radiated power of 100 watts), § 73.511(a) (no new noncommercial educational FM stations will be licensed with less than the minimum power of 100 watts), § 73.512(c) ("Except in Alaska, no new Class D applications nor major change applications by existing Class D stations are acceptable for filing except by existing Class D stations seeking to change frequencies."). This effectively barred any future microbroadcasters.[1] *See* Jesse Walker, *With Friends Like These: Why Community Radio Does Not Need the Corporation for Public Broadcasting*, Cato Institute, Policy Analysis No. 277 (1997) <http://www.cato.org/pubs/pas/pa-277.html>; *Changes in Rules Relating to Noncommercial Educational F.M. Broadcast Stations,* 69 F.C.C. 2d 240 (1978), *modified,* 70 F.C.C. 2d 972 (1979). The premise underlying the ban was the alleged scarcity of available frequencies and the inability to ac-

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[1] However, the FCC continued to issue licenses to low-power translators and boosters -- which rebroadcast the signals from larger stations -- but refused to allow these categories of small stations to broadcast original programming. *Turro v. FCC,* 859 F.2d 1498 (D.C. Cir. 1988).

commodate more stations without causing harmful interference. *Id.*

However, the ban left thousands of small "holes" or gaps in the spectrum, too small to accommodate a full-power station, but perfect for small broadcasters. Walker, *With Friends Like These*, *id.* During this same time, the cost of starting a low-power station dropped dramatically. Due to technological advancements and the declining cost of equipment, it became possible for microbroadcasters to inexpensively create and operate low-power radio stations of less than 100 watts in the gaps remaining in the spectrum. *Id.* By the end of the 1980's, these gaps became increasingly filled by unlicensed broadcasters, often called "pirates." *Id.* Until the mid-1990's the FCC largely overlooked these microradio "pioneers," except in cases of objectionable interference to other stations or services. *See, e.g.*, Walker, *Rebel Radio: The FCC's Absurd New Crusade*, The New Republic, Mar. 9, 1998, at 9-11.

Moreover, in response to a rulemaking proceeding brought by various microbroadcasters, and supported by Szoka,[2] the Commission ultimately repudiated the premise underlying the now-defunct ban: the purported lack of available frequencies for low-power radio stations. The Commission conceded there were plenty of available frequencies, and that the ban could not be justified, in its Jan. 28, 1999 notice of proposed rulemaking paving the way for the current low power FM (LPFM) service. *In re Creation of a Low-Power FM Radio Service*, 14 FCC Rcd

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[2] "Szoka, and many other microbroadcasters, submitted comments on these proposed rules and actively pursued their implementation." *United States v. Szoka*, No. 1:99CV2008, Memorandum & Order at 5 (N.D. Oh. Feb. 24, 2000), *aff'd*, 260 F.3d 516 (6th Cir. 2001).

2471, 1999 WL 46878. First, the Commission correctly recognized that its regulatory ban on microbroadcasters wasted a large volume of the spectrum resource, contrary to its statutory mandate, the public interest, and constitutional limitations. *Id.* at ¶¶ 1, 30-31.

Second, it conceded that potentially several hundred thousand new FM stations could obtain valid LPFM licenses, in addition to the 7,679 presently licensed FM stations, and that the present licensing scheme erected prohibitive economic barriers to entry of microbroadcasters such as Szoka. *Id.* at ¶¶ 1, 10, 12, 72 (citations omitted); App. E (Initial Regulatory Flexibility Analysis) (noting 13,000 inquiries concerning LPFM licenses during past year).[3] Finally, the Commission recognized that

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[3] A rider to a recent appropriations bill enacted by Congress has the effect of limiting the number of microradio stations that can be licensed. It requires minimum distance separations for third-adjacent channels until Congress can review an experimental program waiving such separations for microbroadcasters. *See Making Appropriations for the Government of the District of Columbia for FY 2001*, Pub. L. No. 106-553, 114 Stat. 2762, § 632 (2000); *Creation of a Low Power Radio Service, Second Report and Order*, 2001 WL 310997, ¶ 1 (April 2, 2001)("Second Report and Order"). Although the constitutionality of such additional separation requirements is not raised by this case, prior experience has shown that even many high-power stations successfully operate without such separations. *See In re Grandfathered Short-Spaced FM Stations*, 12 FCC Rcd 11840, 11841, 11849 (1997) (eliminating second- and third-adjacent channel protections for many grandfathered FM radio stations operating with far more power than microradio stations); *Report and Order*, 15 FCC Rcd 2205, ¶ 74 (elimination of second- and third-adjacent channel protection resulted in "no interference complaints"). Moreover, a large number of microradio stations can easily fit within unused gaps in the spectrum even if third-adjacent channel protection is required. *See FCC Announces First 255 Applicants Eligible for Low Power FM Radio Stations* (Dec.

(continued...)

microbroadcasters like Szoka could serve a vital public interest, increasingly unmet due to the concentration of license ownership since the 1996 Telecommunications Act, and that the present regulatory ban on microbroadcasters was not due to spectrum efficiency or interference considerations, but more to deference to the economic self-interest of existing FM incumbents. *Id.* at ¶¶ 40, 83, 91, 112; Joint Statement of Chairman William E. Kennard and Commissioner Gloria Tristani.[4]

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[3](...continued)
21, 2000) <http://www.fcc.gov/Bureaus/Mass_Media/News_Releases/ 2000/nrmm0047.html> (noting 255 applicants might receive construction permits in just the first two of five application windows for LPFM stations); *Notice of Acceptance of Low Power FM Broadcast Applications and Notifications of Petitions to Deny Deadline*, Report No. LPFM-S-1 (Dec. 21, 2000) <http://www.fcc.gov/Bureaus/-Mass_Media/Public_Notices/FM_Windows/pnmm0084.html> (the 255 LPFM broadcast license applications "fully complie[d] with LPFM station protection requirements" and "recent legislation" requiring third-adjacent channel protection and were "not in conflict with any other application").

[4] As was the case with venerable civil rights protests of the past, Szoka was part of a grass-roots movement of microradio "pioneers" (called "pirates" by the FCC and the National Association of Broadcasters) whose "broadcast civil disobedience" helped demonstrate the need for and viability of microradio, as well as the unlawfulness of the FCC's regulatory ban on small stations. *See, e.g.*, Greg Ruggiero, *Microradio Broadcasting: Aquascalientes of the Airwaves*, Z Magazine at 25 (Dec. 1998) (quoting Noam Chomsky); Jim Cullen, *Pirate Radio Fights for Free Speech*, The Progressive Populist (April 1998). This movement gained momentum during recent years due to rapid consolidation of radio stations following passage of the Telecommunications Act of 1996, P.L. 104-104, 110 Stat. 56, § 202 (b) (eliminating national limits on multiple ownership and allowing up to 8 local stations under common ownership), and the virtual elimination of locally-owned outlets. *United States v. Szoka*, Memorandum & Order
(continued...)

C. Factual Background

Szoka founded Grid Radio in 1995 because the existing stations serving the Cleveland market were not adequately serving the entertainment and information needs of his niche audience of gay men and women and the arts community. 7/24/98 Szoka Declaration in *In re Szoka*, FCC CIB Docket No. 98-48, at ¶ 29 & Ex. B, C.A. App. 77, 88; *United States v. Szoka*, 260 F.3d 516, 518, 520 (6th Cir. 2000) (Pet. App. A45-A46, A48-A49); *see Grid Radio v. FCC*, 278 F.3d at 1320 (Pet. App. A10). Szoka chose an empty frequency, 96.9 Mhz., a low power output, 48.8 watts effective radiated power, and low antenna height, 80 feet above average terrain. These choices did not cause harmful interference, but at the same time were sufficient to serve his audience with a quality signal. 7/24/98 Szoka Declaration at ¶ 21 & Ex. A, C.A. App. 73-74, 80; *see Szoka*, 260 F.3d at 519 (Pet. App. A47). Szoka carefully considered applying for an FCC license, but did not do so because it would have been a wasteful exercise in futility, as the D.C. Circuit has found. *Grid Radio*, 278 F.3d at 1319 ("We agree with Szoka that applying for a waiver [of the ban] would have been futile") (Pet. App. A9).

Grid Radio provided news, information, and public service programming (such as AIDS awareness and testing, fundraising, and mental health counseling), including a three-hour news program focused on the gay community, and coverage of local artistic and entertainment events.

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[4](...continued)
at 3 (addendum to this brief at A3); Fofana, Comment, *Creating a Diversity of Voices: Local Expression Through a Low Power Radio Service*, 7 Comm. Law Conspectus 409, 410 (1999).

7/24/98 Szoka Declaration at ¶¶ 5, 7, 8, C.A. App. 66-69; *see also United States v. Szoka*, 260 F.3d at 518, 519-20 (Pet. App. A48-A49). Grid entertained its audience with a format of club-oriented dance music, which was also unavailable elsewhere in the market. 7/24/98 Szoka Declaration at ¶¶ 9, 11-14, C.A. App. 69-71. The Commission has never disputed Szoka's claim that he was serving an audience whose needs were not being met by other broadcasters.

The FCC did not allege that Grid Radio was causing any harmful interference with other licensees or services. Nor did the FCC allege that Grid Radio was posing any threat to public health and safety. Szoka confined his signal within the limits recognized by other broadcasters, making every effort to avoid interference with other broadcasters and services. Because Grid Radio's signal was comparatively weak, and the FCC has allocated all frequencies in the Cleveland area to Class B stations, *see* 47 C.F.R. § 73.202 (tables), it was not difficult for Grid Radio's small station to fit in an unused portion of the spectrum.

D. Summary of Proceedings

On April 6, 1998, the Commission began its proceedings against Szoka by ordering him to show cause why a cease-and-desist order to halt unlicensed broadcasting should not issue and why a monetary forfeiture should not be imposed on him pursuant to 47 U.S.C. §§ 301 and 312(c). *In re Jerry Szoka*, Order to Show Cause, 13 FCC Rcd. 10630, 1998 FCC LEXIS 1579, 1998 WL 153227. Without an evidentiary hearing, an ALJ issued the order and imposed an $11,000 forfeiture on September 4, 1998, based solely on Szoka's unlicensed broadcasts, rejecting

Grid's constitutional and statutory challenges, and observing that "Szoka's qualities as a broadcaster, and the value of his programming are immaterial." *In re Jerry Szoka*, Summary Decision, 1998 WL 559385, 1998 FCC LEXIS 4563, ¶ 8 n.4. Relying on the doctrine that scarcity of the spectrum resource justified less First Amendment protection for broadcasters than for speakers in other media (the "scarcity doctrine"), the ALJ rejected Szoka's challenge to the microbroadcasting ban. *Id.* at ¶¶ 9-11.

On June 15, 1999, the full Commission rejected Szoka's exceptions to the ALJ's decision, concluding that the microbroadcasting regulations were constitutional (¶¶ 11-19). *In re Jerry Szoka*, Decision, 14 FCC Rcd 9857, 1999 WL 386918 (Pet. App. A17-A35). (The Commission did so despite its concession in January 1999 that the ban was unwarranted. *See In re Creation of a Low-Power FM Radio Service*, 14 FCC Rcd 2471). On October 19, 1999, the Commission denied Szoka's petition for reconsideration. *In re Jerry Szoka*, 14 FCC Rcd 201-47, 1999 WL 867680 (Pet. App. A36-A43). Szoka then appealed the FCC's fine and cease-and-desist order to the D.C. Circuit.

The FCC, on August 20, 1999, filed a lawsuit in Cleveland, Ohio to enforce the cease-and-desist order against Szoka. The local district court recognized that Szoka called the FCC to try and obtain a license "but the FCC informed him that it would not license low-powered FM stations that broadcast at 100 watts or less." *United States v. Szoka*, No. 1:99CV2008, Memorandum & Order at 2 & n.2 (N.D. Oh. Feb. 24, 2000) (Pet. App. A74). The court noted that Szoka had chosen an empty frequency in Cleveland, that the FCC had "made no effort" to show Szoka was causing any interference, and that he "has been

very conscientious about interference with other frequencies and has strived to make broadcasts that, other than being unlicensed, comply with all FCC regulations." *Id.* (Pet. App. A76).

The court concluded that the traditional equity analysis did not apply to this enforcement action. *Id.* at 9. (Pet. App. A82-A83). The court next concluded that it "must grant the injunction despite the possibility of a "patently illegal licensing system" and "regardless of its views on the wisdom or legality of the FCC's longstanding ban on Class D broadcasting" because "Szoka has no constitutional right to broadcast without a license." *Id.* at 17 (Pet. App. A92). The Court relied on cases upholding various FCC regulations, relying primarily on the "scarcity rationale" to depart from traditional First Amendment standards. *Id.* at 18-19 (Pet. App. A94-A95).

The court recognized that the FCC probably was violating the First Amendment:

> Szoka's argument that the FCC's long-standing ban on low power radio is unconstitutional because it did not properly take account of the "public interest," however, does have some force. . .Based on the limited record before it, the Court is inclined to agree that the FCC's noncommercial low-power broadcasting ban smacks of favoritism towards wealthier interest groups who do not wish to share the airwaves with non-commercial stations. The ban seems to have placed impenetrable barriers in front of new and diverse voices who wish to begin broadcasting without moving up the ladder of a larger, established, station, and to have done so with little technological support for its implementa-

> tion and long employment. It is not difficult to conclude that such a ban would run contrary to the FCC's obligation to distribute the airwaves in a manner that furthers the "public interest," and, thus, would be inconsistent with the First Amendment.

Id. at 20-22 (Pet. App. A96-A98); *see also Szoka*, 260 F.3d at 521 (quoting the district court) (Pet. App. A51-A52).

Despite the doubts it expressed regarding the constitutionality of the regulatory ban on LPFM licenses, the district court concluded that statutory and constitutional defenses are "irrelevant" in an enforcement proceeding and that "this is not the correct forum to bring a direct challenge to the FCC's ban on low-power radio, making this Court's views of that ban irrelevant . . . leaving the question to another day and another forum." Memorandum & Order at 22-23 (Pet. App. A98-A99). The Sixth Circuit affirmed the district court's order, ruling that only the D.C. Circuit could hear Szoka's challenge to the constitutionality of the microbroadcasting ban. *United States v. Szoka*, 260 F.3d 516, 528 (6th Cir. 2001) ("the Communications Act gives exclusive jurisdiction for review of FCC cease and desist orders to the D.C. Circuit. . .[Szoka] can address his constitutional arguments only to the D.C. Circuit") (Pet. App. A66); *see also Grid Radio*, 278 F.3d at 1318 (D.C. Cir. 2002) ("the Sixth Circuit . . . declin-[ed] to reach Szoka's constitutional challenge to the microbroadcasting ban because in its view, the D.C. Circuit has exclusive jurisdiction to 'nullify a cease-and-desist order based on unconstitutional regulations promulgated by the [Commission]'") (Pet. App. A5-A6), *quoting Szoka*, 260 F.3d at 528.

Ironically, the D.C. Circuit, the one circuit with jurisdiction to hear Szoka's constitutional defense, refused to hear it. The D.C. Circuit began by conceding that "the Constitution permits a person faced with an unconstitutional licensing law to 'ignore it and engage with impunity in the exercise of the right of free expression for which the law purports to require a license.'" *Grid Radio*, 278 F.3d at 1320 (Pet. App. A9), *quoting Shuttlesworth v. Birmingham*, 394 U.S. 147, 151 (1969). Nevertheless, it avoided deciding the constitutionality of the microbroadcasting ban by holding that the ban had to be "indisputably unlawful or unconstitutional" under prior Supreme Court decisions before Szoka could rely on its unconstitutionality as a defense against punishment for speaking without a license. *Grid Radio*, 278 F.3d at 1316, 1321 (D.C. Cir. 2002) (Pet App. A2, A13). Applying that standard, it held that it would be "inappropriate to consider [Szoka's] challenge to the microbroadcasting ban absent 'an indisputable indication'" that the ban was unconstitutional, "because of the reasoning of a Supreme Court decision." It refused to consider Szoka's constitutional challenges because none of them could "clear[] this high bar." *Id.* at 1321. (Pet. App. A13).

REASONS FOR GRANTING THE PETITION

This Court should grant review because the standard applied by the D.C. Circuit conflicts with decisions by this Court and other circuits allowing speakers to challenge the constitutionality of licensing schemes in enforcement proceedings, even when the unconstitutionality of the licensing scheme was not clearly established at the time of enforcement. Moreover, the FCC's microbroadcasting ban violated the First Amendment.

A. THE D.C. CIRCUIT'S HOLDING THAT THE UNCONSTITUTIONALITY OF A LICENSING SCHEME MUST BE "INDISPUTABLY" CLEAR BEFORE IT CAN BE USED AS A DEFENSE CONFLICTS WITH THIS COURT'S DECISIONS.

Many of this Court's decisions allowing unlicensed speakers to successfully challenge licensing schemes as a defense to prosecution came in First Amendment cases of first impression, where there was by definition no Supreme Court decision demonstrating that the unlicensed speech was clearly protected. *E.g., Thomas v. Collins*, 323 U.S. 516, 529-31 (1945) (5-to-4 decision overturning conviction for contempt for unlicensed expressive activities even though case implicated "delicate" constitutional balance and "[w]here the line shall be placed in a particular application rests, not on such generalities, but on the concrete clash of particular interests and the community's relative evaluation both of them and how the one will be affected by the specific restriction, the other by its absence"); *Cantwell v. Connecticut*, 310 U.S. 296, 305-06 (1940) (holding for the first time that the Free Exercise Clause applies fully to the states); *Freedman v. Maryland*, 380 U.S. 51, 56-57 (1965) (overturning conviction of motion picture shower even though prior rulings had suggested very limited protection for motion pictures and even though "motion pictures are not 'necessarily subject to the precise rules governing any other particular method of expression,'" *quoting Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 503 (1951)); *Schneider v. State*, 308 U.S. 147, 165 (1939) (holding for the first time that door-to-door canvassing is protected); *Shuttlesworth v. Birmingham*, 394 U.S. 147 (1969) (Harlan, J., concurring) (voting

to rule in favor of speakers prosecuted for demonstrating without a license even though "the difficult question this case presents is whether the Fourteenth Amendment ever bars a state from punishing a citizen for marching without a permit which could have been procured if all available remedies had been pursued," an open question in light of prior cases like *Poulos v. New Hampshire*, which rejected First Amendment challenges to denials of permits where appeals to state courts were available).

Certainly, none of this Court's licensing cases contains any limiting language suggesting that a First Amendment defense to prosecution must show indisputable unconstitutionality, as opposed to simply unconstitutionality. *See, e.g., Staub v. Baxley*, 355 U.S. 313, 319 (1958) ("The decisions of this court have uniformly held that the failure to apply for a license which on its face violates the Constitution does not preclude review in this Court of a judgment of conviction under such an ordinance"); *Thornhill v. Alabama*, 310 U.S. 88, 97 (1940) ("One who might have had a license for the asking may therefore call into question the whole scheme of licensing when he is prosecuted for failure to procure it"); *Jones v. Opelika*, 316 U.S. 584, 602 (1943), *dissent adopted per curiam on rehearing*, 319 U.S. 103, 104 (1943); *Lovell v. Griffin*, 303 U.S. 444, 452-53 (1938) ("As the ordinance was void on its face, it was not necessary for appellant to seek a permit under it"); *Shuttlesworth v. Birmingham*, 304 U.S. 147 (1969) ("The Constitution can hardly be thought to deny one subjected to the restraints of an [unconstitutional licensing] ordinance the right to attack its constitutionality, because he has not yielded to its demands"); *Schneider v. State*, 308 U.S. 147, 165 (1939) ("[T]he ordinance in question, as applied to petitioner's conduct, is void, and she cannot be punished for acting without a permit"); *see*

City of Lakewood v. Plain Dealer Pub. Co., 486 U.S. 750 (1988) (*quoting Thornhill* and *Shuttlesworth*). In short, the rule is clear: the unconstitutionality of a licensing scheme is always been a defense to its enforcement.

The D.C. Circuit declined to apply this rule out of speculation that it might result in "chaos." *See Grid Radio*, 278 F.3d at 1321 (Pet. App. A11). It reasoned that "[p]ermitting Szoka or anyone else to operate without a license as a means of challenging the microbroadcasting ban, however, could produce the very 'chaos' that . . . the broadcast licensing regime was designed to prevent." *Id.*

But the same could have been said in all the cases in which this court permitted unlicensed speakers to use unconstitutionality as a defense to the enforcement of licensing schemes. Unlicensed speech can always lead to disorder, since the whole purpose of a licensing scheme is to allocate scarce opportunities for speech in an orderly manner. For example, "two parades cannot march on the same street simultaneously." *Grayned v. City of Rockford*, 408 U.S. 104, 115 (1972). Yet this Court has not required that the unconstitutionality of a parade licensing scheme be "indisputably clear" before it can be used as a defense to prosecution.

Moreover, the notion that "chaos" would result from permitting the unconstitutionality of a broadcasting restriction to be used as a defense is simply fanciful. The defense only works if a speaker can prove that a restriction is in fact unconstitutional, *i.e.*, unnecessarily restrictive. So speakers broadcast without a license at their peril. And few people are willing to defy an unconstitutional law, given the risk of prosecution and legal expenses it entails.

B. THE D.C. CIRCUIT'S HOLDING IS INCONSISTENT WITH OTHER CIRCUIT COURT HOLDINGS.

Unlike the D.C. Circuit, other circuits do not require a constitutional defense to be crystal clear before it can be relied upon by an unlicensed speaker to challenge enforcement of the licensing requirement. *United States v. Baugh*, 187 F.3d 1037, 1042-43, 1045 (9th Cir. 1999) (overturning convictions for demonstrating without a permit, even though another circuit had already upheld "the companion regulation to [the challenged regulation] that . . . contains similar language" in *United States v. Kistner*, 68 F.3d 218 (8th Cir. 1995), and even though a concurring judge observed that "conscientious officers, concerned with public safety and the protection of park property," could well have reached the same conclusion); *United States v. Frandsen*, 212 F.3d 1231 (11th Cir. 2000) (overturning convictions of protesters in federal court under federal park regulation requiring a permit even though the Eighth Circuit had upheld a companion regulation in *Kistner, supra*).[5]

Indeed, even the D.C. Circuit's own prior cases

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[5] *See also Walnut Properties, Inc. v. City of Whittier*, 861 F.2d 1102 (9th Cir. 1988) (granting qualified immunity because the law was not clearly established, but invalidating licensing scheme in action for damages and injunctive relief brought by bookstore owner after an enforcement action was brought against him in state court); *Grossman v. City of Portland*, 33 F.3d 1200, 1208-10 (9th Cir. 1994) (city could be sued for damages for arresting peace activist for demonstrating without a permit, even though the arresting officer was entitled to qualified immunity because the permit ordinance's unconstitutionality was not "apparent" and it was "objectively reasonable" for the officer to believe that it was constitutional).

entertained challenges to licensing schemes that met no such requirement. *E.g., United States v. Abney*, 534 F.2d 984 (D.C. Cir. 1976) (holding for the first time that expressive sleep was protected speech, and overturning conviction for such sleep in public park without permit authorizing it).[6]

C. THE FCC'S MICROBROADCASTING BAN VIOLATED THE FIRST AMENDMENT.

The D.C. Circuit's heightened standard of unconstitutionality as a defense to enforcement proceedings had very serious consequences in this case. Even if the D.C. Circuit were correct, and the microbroadcasting ban did not *clearly* violate the First Amendment, it nonetheless should have been declared in violation of the First Amendment, since it unnecessarily restricted speech and was not narrowly tailored. "[A]ny permit scheme controlling the time, place, and manner of speech must not be based on the content of the message, must be narrowly tailored to serve a significant government interest, and must leave

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[6] The D.C. Circuit in *Grid Radio* drew its exacting "indisputably illegal" standard out-of-context from language in an earlier D.C. Circuit decision, *Tribune Co. v. FCC*, 133 F.3d 61, 68 (D.C. Cir. 1998). *Tribune* was simply irrelevant. It involved a policy (the FCC's cross-ownership rule) already upheld unanimously by this Court in *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775 (1978), not a case of first impression like this one, and thus merely reflected the fact that the "[t]he Supreme Court has told the lower federal courts in no uncertain terms that we are to leave the overruling of its opinions to the Court itself." *Tribune*, 133 F.3d at 68, *citing State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997). Moreover, it did not involve unlicensed speech, so it cannot support placing a higher burden on unlicensed speakers.

open ample alternatives for communication." *Forsyth County v. Nationalist Movement,* 505 U.S. 123, 130 (1992).

1. The Microbroadcasting Ban Was Not Narrowly-Tailored.

As the FCC itself has recognized, to survive constitutional scrutiny, a restriction on broadcast speech must have been at least a narrowly tailored method of achieving a substantial governmental interest. *FCC v. League of Women Voters,* 468 U.S. 364, 380 (1984); *In re Syracuse Peace Council,* 2 FCC Rcd 5043, ¶ 77 (1987) ("governmental restrictions on broadcasters' speech are permissible under the First Amendment only in situations in which those restrictions are 'narrowly tailored to further a substantial government interest,'" *quoting League of Women Voters*), *aff'd sub nom. Syracuse Peace Council v. FCC,* 867 F.2d 654 (D.C. Cir. 1989); *see also Community-Service Broadcasting v. FCC,* 593 F.2d 1102, 1122 (D.C. Cir. 1978) (en banc) (even "where non-content-based distinctions are drawn in a statute affecting First Amendment rights, the Supreme Court has held that the government interest served must be 'substantial' and the statutory classification 'narrowly tailored'").

Since a microbroadcaster can fit in a gap in the electromagnetic spectrum that is too small to fit a regular broadcaster, there is space in the spectrum to accommodate thousands of microbroadcasting stations, without interfering with existing radio stations. *In re Creation of a Low-Power FM Radio Service,* 14 FCC Rcd 2471, 1999 WL 46878, ¶¶ 1, 10, 12, 72 (FCC conceded that potentially several hundred thousand new FM stations could obtain valid LPFM licenses, in addition to the 7,679 pres-

ently licensed FM stations); Thomas W. Hazlett and Bruno E. Viani, *Legislators v. Regulators: The Case of Low Power FM Radio*, Working Paper 02-1, at pg. 5 (AEI-Brookings Joint Center for Regulatory Studies, Feb. 2002) (spectrum contains room "for nearly 100,000 low power FM stations" without causing any interference to existing stations, although Congressional restrictions on micro-broadcasters have limited the number of licensed micro-broadcasters to "about 600"); Jesse Walker, *With Friends Like These: Why Community Radio Does Not Need the Corporation for Public Broadcasting*, Cato Institute, Policy Analysis No. 277 (1997) <http://www.cato.org/pubs/pas/pa-277.html>. And there are thousands of individuals and entities interested in operating microradio stations. *In re Creation of a Low-Power FM Radio Service*, at App. E (Initial Regulatory Flexibility Analysis) (noting 13,000 inquiries concerning LPFM licenses during 1998).

By denying microbroadcasters the opportunity to obtain licenses, the FCC was thus gratuitously wasting spectrum. That waste of spectrum unnecessarily restricted speech and thus violated the First Amendment.

2. The Microbroadcasting Ban Cannot Be Justified Under the Scarcity Doctrine Because It Wastes Scarce Spectrum.

This Court has given the FCC a somewhat freer hand in regulating broadcast speech than the government generally has in regulating speech, based on the purported scarcity of space to broadcast on the electromagnetic spectrum. *Red Lion Broadcasting Co. v. FCC*, 395 U.S.

367 (1969).[7] Thus, the FCC can consider content to ensure the representation of a diversity of programming on the broadcast spectrum. *See id.* The D.C. Circuit reasoned that because "the microbroadcasting ban rests" on this "scarcity doctrine," and the scarcity doctrine has not been repudiated by this Court, it could not be said that the microbroadcasting ban was "indisputably" unconstitutional. *Grid Radio*, 278 F.3d at 1322.

But the scarcity doctrine does not justify the microbroadcasting ban, because it wastes, rather than simply allocates, scarce spectrum. The mere fact that the scarcity doctrine permits a greater degree of regulation of content in the broadcast context than elsewhere hardly means that

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[7] The scarcity rationale has increasingly been criticized by courts and even the FCC itself. *E.g., Telecommunications Research and Action Center v. FCC*, 801 F.2d 501, 508-509 (D.C. Cir. 1986) ("Since scarcity is a universal fact, it can hardly explain regulation in one context and not another"); *In re Syracuse Peace Council*, 2 FCC Rcd 5043, 5043 n.2, 5057-58 (1987) (abolishing fairness doctrine, and holding that "scarcity" is an improper basis for applying a diluted standard of constitutional protection to electronic media), *aff'd sub nom. Syracuse Peace Council v. FCC*, 867 F.2d 654 (D.C. Cir. 1989). *See also Denver Area Educational Telecommunications Consortium v. FCC*, 518 U.S. 727, 813 (1996) (Thomas, J., joined by Rehnquist, C.J., and Scalia, J., dissenting) (characterizing the scarcity doctrines as "dubious from their infancy"); *Columbia Broadcasting System v. Democratic National Committee*, 492 U.S. 94, 154 (1973) (Douglas, J., concurring) (rejecting the notion that scarcity justifies giving broadcasters less First Amendment protection than newspapers and magazines); *FCC v. League of Women Voters*, 468 U.S. 364, 376 n.11 (1984)(noting that the scarcity rationale "has come under increasing criticism in recent years"). To petitioners' knowledge, this case is the first to employ the "scarcity" doctrine to change the burden of proving the unconstitutionality of a speech restriction (from "unconstitutional" to "clearly unconstitutional") rather than simply to give the FCC greater leeway to regulate the mix of speech in the marketplace.

every restriction on broadcast speech is constitutional. Indeed, this Court has struck down regulations even under this more lenient standard, a case in point being *FCC v. League of Women Voters*, 468 U.S. 364 (1984), which invalidated a broadcast ban on editorializing by recipients of federal subsidies, despite applying a lower-level of protection to broadcast speech.

Szoka's argument that the microbroadcasting ban was unconstitutional was not contingent on the scarcity doctrine no longer being good law. Even if the FCC has discretion in how it allocates scarce spectrum, as the scarcity doctrine teaches, it still has no justification for wasting spectrum by leaving gaps in it that could easily accommodate a microbroadcaster, without interfering with any other broadcaster. *See Red Lion*, 395 U.S. at 393 (spectrum scarcity does not justify applying regulations that have "the net effect of reducing rather than enhancing" speech).

The viability of the scarcity doctrine, and its grant of greater discretion to regulate broadcast speech, was thus a necessary, but not a sufficient, condition for the microbroadcasting ban's constitutionality. The D.C. Circuit has taken a doctrine intended to give the FCC power to choose among potential users of the spectrum to ensure that a variety of voices are heard and turned it into a grant of authority to gratuitously waste the spectrum that facilitates speech.

CONCLUSION

This Court should grant the petition for certiorari and review the judgment of the D.C. Circuit.

Respectfully submitted,

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May 2002

APPENDIX

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GRID RADIO AND
JERRY SZOKA,
APPELLANTS

v.

FEDERAL COMMUNICATIONS COMMISSION
APPELLEE

NATIONAL ASSOCIATION OF BROADCASTERS
INTERVENOR

No. 99-1463, Consolidated with 99-1527

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

278 F.3d 1314

September 13, 2001, Argued

February 8, 2002, Decided

Appeal from and Petition for Review of an Order of the Federal Communications Commission.

Hans F. Bader argued the cause for appellants/petitioners. With him on the briefs was *Michael E. Rosman*. *Michael P. McDonald* entered an appearance.

Rodger D. Citron, Counsel, Federal Communications Commission, argued the cause for appellees/respondents. With him on the brief were *Jane E. Mago*, General Coun-

sel, *Daniel M. Armstrong*, Associate General Counsel, *Jacob M. Lewis* and *Mark Davies*, Attorneys, U.S. Department of Justice. *David Silberman*, Counsel, Federal Communications Commission, entered an appearance.

Henry L. Baumann and *Jack N. Goodman* were on the brief for intervenor National Association of Broadcasters.

Before: TATEL and GARLAND, *Circuit Judges*, and WILLIAMS, *Senior Circuit Judge*.*

* Senior Circuit Judge Williams was in regular active service at the time of oral argument.

Opinion for the Court filed by *Circuit Judge* TATEL.

[*1316] TATEL, *Circuit Judge*:

An unlicensed operator of a lowpower FM radio station challenges a Federal Communications Commission order directing him to cease broadcasting. He contends the order and an ancillary $ 11,000 forfeiture are unenforceable because the Commission's ban on low-power FM stations, in place until January 2000, contravened the Communications Act of 1934 and the First Amendment, and because the forfeiture is unreasonable, excessive, and beyond his ability to pay. We reject these claims and affirm. Absent a demonstration that the low-power ban was indisputably unlawful or unconstitutional, the Commission had no obligation to reconsider the ban in the context of an enforcement proceeding against a single unlicensed operator. Moreover, the forfeiture is reasonable under the circumstances of this case, and the operator waived his inability-to-pay claim.

I.

Section 301 of the Communications Act of 1934 makes it unlawful to operate a radio station without a license from the Federal Communications Commission. 47 U.S.C. § 301. Historically, the Commission's elaborate licensing scheme included four classes of licenses--A, B, C, and D--distinguished on the basis of such factors as station location, antenna height, and transmission power. Until 1978, the Commission allocated Class D licenses to "microbroadcast stations," so called because they operate at power levels of less than one hundred watts and reach listeners within a two to twelve-mile radius of the point of transmission. In 1978, however, choosing to "strike the balance in favor of licensing higher-powered stations to ensure that large audiences were served," [*1317] the Commission adopted a "microbroadcasting ban" pursuant to which it stopped awarding Class D licenses. Creation of a Low Power Radio Serv., 15 F.C.C. Rcd. 19,208, 19,23-6 (2000) (reconsideration) (discussing Changes in the Rules Relating to Noncommercial Educ. FM Broad. Stations, 70 F.C.C.2d 972, 983 (1978) (codified at 47 C.F.R. § 73.512(d)).

At all times relevant to this case, appellant Jerry Szoka knew of both the licensing requirement and the microbroadcasting ban. Yet from 1995 until mid-2000, Szoka operated Grid Radio, an unlicensed low-power station in Cleveland, Ohio. He never applied for a license because he believed applying would be futile given the microbroadcasting ban.

In early 1997, after receiving a complaint about Grid Radio, the Commission sent Szoka two successive letters

warning him that if he continued to operate the station, he could face fines, forfeitures, or criminal sanctions. Responding to the first letter, Szoka urged the Commission to "ignore" his unlicensed operations because Grid Radio "is top quality, provides a much needed community service without commercials, and [does not] interfere with other stations." Jerry Szoka, 13 F.C.C. Rcd. 10,630, 10,630-31 (1998) (order to show cause). Nothing in the record indicates whether Szoka respond[illegible] the second letter.

Despite the Commission's letters, Szoka continued operating Grid Radio. Id. at 10,631. In response, the Commission issued an order directing Szoka to show cause why he should not be ordered to cease and desist from violating section 301. The show-cause order specified two issues for consideration at an upcoming hearing: whether Szoka was "transmitting radio energy without appropriate authorization," and if so, whether he "should be ordered to cease and desist" from that activity. Jerry Szoka, FCC 98D-3, 1998 FCC LEXIS 4563, *1 (1998) (ALJ summary decision). The order also indicated that the Commission was considering "whether ... Szoka should forfeit $ 11,000"--the maximum daily penalty (adjusted for inflation) for a continuing violation of the Act. Id. at *1, *8 (citing 47 U.S.C. § 503(b)(2)(C)); see also 47 C.F.R. § 1.80(b)(5) (detailing how to adjust forfeitures for inflation).

The Chief of the Commission's Compliance and Information Bureau moved for summary decision of the issues identified in the show-cause order. Although Szoka conceded he had no license to operate Grid Radio, he objected to the summary judgment motion, arguing he had no obligation to comply with Commission licensing rules

because the microbroadcasting ban was both unlawful and unconstitutional. He also challenged the forfeiture as unreasonable and excessive in violation of the Fifth and Eighth Amendments to the United States Constitution.

In light of Szoka's concession that he lacked a license to operate Grid Radio, the Administrative Law Judge concluded that no substantial issues of material fact remained, granted the Commission's motion for summary decision, issued a cease-and-desist order, and imposed the forfeiture. Jerry Szoka, 1998 FCC LEXIS 4563, at *3-4. In so doing, the ALJ rejected Szoka's constitutional challenges to the microbroadcasting ban on two alternative grounds: on the merits because the "right of free speech does not include the right to use radio facilities without a license"; and for lack of standing because Szoka failed to apply for either a license or a waiver of the microbroadcasting ban. *Id.* at *6-8 (citing *NBC v. United States*, 319 U.S. 190, 227 (1943); *United States v. Dunifer*, 997 F. Supp. 1235, 1241 [*1318] (N.D. Cal. 1998); Stephen Paul Dunifer, 11 F.C.C. Rcd. 718, 727 (1995)). Rejecting Szoka's Fifth and Eighth Amendment claims, the ALJ found that "imposition of a forfeiture is civil and not a criminal penalty," and that "the statutory scheme authorizing the [Commission] to enforce forfeitures ... contains appropriate safeguards which satisfy due process requirements...." *Id.* at *9-10.

The Commission affirmed the ALJ's order, finding Szoka without standing to challenge the licensing regulations and rejecting his constitutional challenges to the microbroadcasting ban and forfeiture. Jerry Szoka, 14 F.C.C. Rcd. 9857, 9857 (1999). The Commission informed Szoka that he could file a claim of inability to pay the forfeiture by submitting tax returns or other financial

statements covering the previous three years. *Id.* at 9867.

Szoka filed petitions for reconsideration and for a stay of the orders against him, claiming, among other things, that he was unable to pay the forfeiture. In support, Szoka submitted a financial statement and tax returns for 1996 through 1998 showing $ 8,500 in assets and an annual adjusted gross income averaging about $ 12,000. Jerry Szoka, 14 F.C.C. Rcd. 20,147, 20,150 (1999) (reconsideration). The Commission denied Szoka's petitions for reconsideration and for a stay, and also rejected without a hearing his claim of inability to pay, finding that although Szoka's "stated assets and income do not appear to be large," he failed to "submit[ ] sufficient objective evidence and supporting information to sustain his claim that they are so inadequate as to render him unable to pay a forfeiture." *Id.* The Commission pointed out that although its Compliance and Information Bureau had invited Szoka to file further documentation in support of his financial claims, he failed to do so. *Id.* at 20,150 n.2.

Following the Commission's rejection of Szoka's motion for reconsideration and for a stay, the cease-and-desist order became effective. Because Szoka continued to operate Grid Radio, the Commission filed suit in the United States District Court for the Northern District of Ohio to compel compliance. *See* 47 U.S.C. § 401(b) (authorizing Commission to "apply to the appropriate district court of the United States for the enforcement of [most orders of the Commission]"). Finding the cease-and-desist order "regularly made and duly served," the district court ordered Szoka to stop broadcasting by March 1, 2000. *United States v. Szoka*, 260 F.3d 516, 523 (6th Cir. 2001) (citing district court's affirmance of the Commission's cease-and-desist order against Szoka) (internal quotation

marks omitted). The Sixth Circuit affirmed, declining to reach Szoka's constitutional challenge to the microbroadcasting ban because in its view, the D.C. Circuit has exclusive jurisdiction to "nullify a cease-and-desist order based on unconstitutional regulations promulgated by the [Commission]." *Id.* at 528.

In the meantime, Szoka filed this appeal of the cease-and-desist order and forfeiture. He alleges that: (1) prior to issuing the cease-and-desist order, the Commission was obligated to demonstrate that shutting down Grid Radio would further the public interest; (2) the now-defunct microbroadcasting ban contravened the Act's requirement that the Commission regulate "in the public interest," 47 U.S.C. § 303(g); (3) the ban violated the First Amendment; (4) the forfeiture constitutes an "excessive fine[ ]" in violation of the Eighth Amendment; and finally, (5) the forfeiture is not the product of reasoned decision-making and should be reduced in light of Szoka's financial hardship. Although the Commission recently abandoned its microbroadcasting ban and [*1319] adopted new rules authorizing the licensing of low-power stations, *Ruggiero v. FCC*, No. 00-1100, slip. op. at 3-5, __ F.3d __ (D.C. Cir. Feb. 8, 2002), Szoka has not applied for a license under the new regime, nor does he challenge that regime here.

II.

The Commission argues that because Szoka failed to apply for a license or to seek a waiver of the microbroadcasting ban, he lacks standing to raise his constitutional and statutory challenges. Since this argument implicates our jurisdiction, we consider it first.

The Commission's standing argument rests on its assertion that Szoka could have challenged the microbroadcasting ban without operating illegally--and therefore without subjecting himself to the cease-and-desist order or incurring the forfeiture. For example, the Commission points out that had Szoka applied for a waiver and the Commission denied his application, he could have appealed to this court and raised his constitutional and statutory challenges to the microbroadcasting ban at that time. 47 U.S.C. § 402(b)(1). Further, if Szoka had requested a waiver and the Commission dragged its feet in responding to the request, Szoka could have petitioned this court for a writ of mandamus to compel Commission action. *See Telecomm. Research & Action v. FCC*, 242 U.S. App. D.C. 222, 750 F.2d 70, 79 (D.C. Cir. 1984) (discussing this court's jurisdiction to hear claims of unreasonable agency delay). Given the number of lawful avenues available to him to challenge the microbroadcasting ban, the Commission argues, Szoka cannot now claim that his unlawful broadcasts were necessary to obtain judicial review of the ban. Thus, Szoka's injury is traceable not to the ban but to the more general prohibition against operating without a license, which Szoka does not challenge here. Accordingly, the Commission contends, Szoka has failed to demonstrate one of the prerequisites to Article III standing: a personal injury fairly traceable to the challenged Commission action. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 119 L. Ed. 2d 351, 112 S. Ct. 2130 (1992).

We are unpersuaded. To begin with, the cease-and-desist order and forfeiture are, as Szoka argues, present injuries, both of which are fairly, if circuitously, traceable to the Commission's microbroadcasting ban. The record before us is clear: But for the ban, Szoka would have applied for a license, and the Commission points to no

individual characteristics--of either Szoka or Grid Radio--that would have led it categorically to deny his application in the absence of the ban. Moreover, we agree with Szoka that applying for a waiver would have been futile. *See Prayze FM v. FCC*, 214 F.3d 245, 251 (2nd Cir. 2000) (noting that although a plaintiff must generally submit to a policy "to establish standing to challenge" its constitutionality, "this threshold requirement ... may be excused ... where a plaintiff makes a substantial showing that application for the benefit ... would have been futile"); *Ellison v. Connor*, 153 F.3d 247, 255 (5th Cir. 1998) (same); *cf. DKT Mem'l Fund, Ltd. v. Agency for Int'l Dev.*, 258 U.S. App. D.C. 257, 810 F.2d 1236, 1238 (D.C. Cir. 1987) (noting that "otherwise qualified non-applicants may have standing to challenge a disqualifying statute or regulation"). The Commission cites only two instances in the last two decades in which it granted a waiver to the microbroadcasting ban--once to an Indian village in Alaska, where the microbroadcasting ban does not apply, and once to a remote community in a Navajo-speaking area of New Mexico, where high-power, English broadcasts are of little relevance. *Turro v. FCC*, 859 F.2d 1498, 1500 n.1 [*1320] (D.C. Cir. 1988) (noting these two instances). Neither of these waivers suggests that the Commission would seriously consider granting a waiver for Szoka to broadcast in English in Cleveland, Ohio. Finally, we agree with Szoka that because the Constitution permits a person faced with an unconstitutional licensing law to "ignore it and engage with impunity in the exercise of the right of free expression for which the law purports to require a license," the illegality of his unlicensed operations cannot, as the Commission implies, entirely preclude him from raising his constitutional claims. *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 151, 22 L. Ed. 2d 162, 89 S. Ct. 935 (1969).

III.

Turning to the merits, we begin with Szoka's argument that under the Communications Act the Commission should have considered whether shutting down Grid Radio would further the public interest. According to Szoka, his station served a "niche audience" "not adequately served" by full-power FM stations: "gay men and women and the arts community." Appellants' Br. at 11. Valuable as Grid Radio's broadcasts may have been, we think it clear that the Commission had no obligation to consider the station's individual circumstances before shutting it down. At the time this controversy began, the Commission had determined that the public interest was best served by uniformly denying licenses to low-power stations to promote "the establishment of more efficient, stable, full powered stations." Creation of a Low Power Radio Serv., 15 F.C.C. Rcd. at 19,236 n.93 (internal citations omitted). Although Szoka strenuously disagrees with that determination, the Commission need not reevaluate well-worn policy arguments each time it implements an existing rule in a narrow adjudicatory proceeding against an acknowledged rule-breaker. *Turro*, 859 F.2d at 1500. To hold otherwise would obligate the Commission to "examine an entire range of policy questions that are not unique to [Szoka] and are more appropriately considered in a rulemaking proceeding." *Id.*

Nothing in *C.J. Community Services v. FCC*, 100 U.S. App. D.C. 379, 246 F.2d 660 (D.C. Cir. 1957), requires a different result. Although we concluded there that the Commission could not shut down an unlicensed, low-power television booster station without considering whether "public interest, convenience, and necessity would be

served," our concern related to the Commission's failure to consider or establish any licensing procedure for booster installations. *Id.* at 662 (complaining that the Commission had "not made it possible, after all these years, for the issuance of a license to a booster installation, such as is here disclosed"). This case is very different. Here, the Commission long ago established a licensing regime for broadcast stations and expressly decided not to issue licenses to low-power stations because of the risk of interference to higher-power stations. Creation of a Low Power Radio Serv., 15 F.C.C. Rcd. at 19,236 n.93. That decision would have no import if the Commission had an independent obligation to consider on a case-by-case basis the pros and cons of shutting down each individual, unlicensed microradio operation. Where, as here, the Commission has evaluated the public interest in a rulemaking, it would be absurdly inefficient--and would invite confusion--to require it to perform the same evaluation each time it enforces the resulting rule.

Szoka's broader claims--that the microbroadcasting ban itself was unlawful and unconstitutional, facially and as applied to him--present a harder question, for we generally permit "a party against whom a rule is [enforced] ... [to] pursue [*1321] substantive objections to the rule" at the time of enforcement. *Indep. Cmty. Bankers of Am. v. Bd. of Governors of the Fed. Reserve Sys.*, 338 U.S. App. D.C. 413, 195 F.3d 28, 34 (D.C. Cir. 1999). Permitting Szoka or anyone else to operate without a license as a means of challenging the microbroadcasting ban, however, could produce the very "chaos" that, according to the Supreme Court, the broadcast licensing regime was designed to prevent. *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 375-76, 23 L. Ed. 2d 371, 89 S. Ct. 1794 (1969). Moreover, we have no concern here that "limiting the

right of review of the ... rule would effectively deny [Szoka] ... an opportunity to question its validity." *Functional Music, Inc. v. FCC*, 107 U.S. App. D.C. 34, 274 F.2d 543, 546 (D.C. Cir. 1958). Szoka could have petitioned for a rulemaking or applied for a waiver and, if the Commission denied his request, challenged that denial in the appropriate circuit court. See supra p. 7; 28 U.S.C. § 2342 (1); 47 U.S.C. § 402(a), (b)(1). That he did neither, choosing instead to operate without a license, makes it inappropriate for us to consider his challenge to the microbroadcasting ban absent "an undisputable indication ..., either because of the reasoning of a Supreme Court decision or intervening legislation," that the microbroadcasting [**17] ban was unlawful or unconstitutional. *Tribune Co. v. FCC*, 328 U.S. App. D.C. 198, 133 F.3d 61, 68 (D.C. Cir. 1998) (applying a similarly narrow scope of review in a case involving an application for a waiver of certain broadcasting restrictions). Had Szoka provided such an indication, we would invalidate the cease-and-desist order and forfeiture. But none of his challenges to the microbroadcasting ban clears this high bar.

Szoka first argues that the microbroadcasting ban conflicts with the Commission's "affirmative mandate to maximize use of the spectrum resource." Appellants' Br. at 48. Yet the Commission resolved just this issue in its 1978 rulemaking when it concluded that licensing low-power stations would interfere with the propagation of higher-power stations. Because Szoka offers nothing to suggest that the 1978 policy was indisputably unlawful, we decline now to consider his challenge to it.

Recasting his public-interest argument as a challenge to the ban itself, Szoka next claims that under the Act, the Commission must be "flexible and responsive in applying

its [microbroadcasting] rule[ ], so that the public interest in a particular case is not undermined by a rigid adherence to preestablished rules and regulations." *Id.* at 49. Turro also answers this claim: "Strict adherence to a general rule may be justified by the gain in certainty and administrative ease." 859 F.2d at 1500. Again, therefore, absent evidence that the microbroadcasting ban was indisputably unlawful, the Commission was entitled to adhere to it.

We reach a similar conclusion regarding Szoka's facial and as-applied constitutional claims. According to Szoka, to survive First Amendment scrutiny, "the ban must have been at least a narrowly tailored method of achieving a substantial governmental interest." Appellants' Br. at 35 (citing *FCC v. League of Women Voters*, 468 U.S. 364, 380, 82 L. Ed. 2d 278, 104 S. Ct. 3106 (1984)). Under this intermediate scrutiny standard, he argues, the Commission "had an obligation to revisit the viability of microradio in light of rapid technological changes since [the ban was adopted in] 1978." Appellants' Br. at 37. That the Commission only began to reconsider its microbroadcasting ban in 1999, he implies, indicates that the ban was not narrowly tailored to the interest it served. Moreover, he claims that the original interest served by the ban--the need to promote stable, higher-power stations to [*1322] ensure efficient use of scarce spectrum--is no longer substantial given advances in broadcast technology.

We need not decide whether intermediate scrutiny is the appropriate standard of review, *see, e.g.*, *News America Publ'g Inc. v. FCC*, 269 U.S. App. D.C. 182, 844 F.2d 800, 814 (D.C. Cir. 1988) (discussing the appropriate level of scrutiny to apply to a statute restricting broadcast speech), as we see two simpler responses to Szoka's argu-

ments. First, although the Supreme Court has "obliquely suggested it might [one day] reconsider" the scarcity doctrine on which the microbroadcasting ban rests, judicial ambivalence falls far short of a "clear manifestation that [a] rule ... is [facially] illegal." *Tribune*, 133 F.3d at 68 (discussing *League of Women Voters*, 468 U.S. at 376-77 n.11). Second, Szoka offers no evidence to suggest that his circumstances were so unique as to impose on the Commission a constitutional obligation to apply the ban differently to him than to any other unlicensed microbroadcaster. Absent clear congressional or judicial signals that the microbroadcasting ban was unlawful, or unequivocal evidence that Grid Radio's circumstances warranted differential application of the ban, we think the Commission could continue to enforce the ban and the chaos-averting licensing regime.

IV.

This brings us to Szoka's challenge to the $ 11,000 forfeiture. Decrying this sum as "grossly disproportionate to the gravity of the offense," Szoka first argues that the forfeiture violates the Eighth Amendment's Excessive Fines Clause. Appellants' Br. at 50. We disagree. In the case on which Szoka relies, *United States v. Bajakajian*, the government imposed a fine of over $ 350,000 for failure to report the export of currency. 524 U.S. 321, 324 (1998). Declaring that forfeiture unconstitutional, the Court was primarily concerned that the potential penalty for illegal export of currency would be indefinite and unlimited--and disproportionate to the offense--if the government could seize whatever amount of currency the unwitting "exporter" happened to be carrying when caught. Id. at 334-40. No such problem exists here. The $ 11,000 represents the statutory penalty (adjusted for

inflation) for unlicensed operation of a radio station, or for each day of a continuing violation. 47 U.S.C. § 503(b)(-2)(C); 47 C.F.R. § 1.80(b)(4)-(5). The amount is neither indefinite nor unlimited, nor does it seem excessive in view of Szoka's continued and willful violation of the licensing requirement.

Szoka next argues that the forfeiture is "not the product of reasoned decisionmaking." Appellants' Br. at 52. As in any arbitrary-and-capricious challenge, we "presume the validity" of the agency's action, *Kisser v. Cisneros*, 304 U.S. App. D.C. 317, 14 F.3d 615, 618 (D.C. Cir. 1994)--a presumption Szoka can overcome only by demonstrating that the forfeiture constitutes a "clear error of judgment," *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416, 28 L. Ed. 2d 136, 91 S. Ct. 814 (1971), *overruled on other grounds by Califano v. Sanders*, 430 U.S. 99, 105, 51 L. Ed. 2d 192, 97 S. Ct. 980 (1977). Nothing in either the record or Szoka's briefs convinces us that the Commission's decision to impose the maximum one-day penalty was clearly erroneous: Szoka intentionally operated a radio station without a license for over five years, continued to operate the station after receiving two Commission warning letters, and even refused to shut down after the Commission imposed the cease-and-desist order and forfeiture. In light of Szoka's "deliberate and willful" violation of [*1323] section 301, the penalty seems entirely reasonable. 47 U.S.C. § 503(b)(2)(D) (indicating that in determining the amount of a forfeiture, the Commission "shall take into account," among other things, "the extent[ ] and gravity of the violation and, with respect to the violator, the degree of culpability[and] any history of prior offenses").

Finally, in support of his argument that the Commission

should have reduced the fine because he demonstrated his "inability to pay," Szoka points to three years of tax returns showing adjusted gross income below the poverty line. Appellants' Br. at 58. He also argues that his three capital assets--radio equipment, a 37% interest in a night-club lease, and a 1/12th interest in a commercial building---are illiquid and unavailable to pay the forfeiture. When Szoka presented this evidence to the Commission, however, the agency noted certain "apparent contradictions" and concluded the evidence was "not ... sufficient to justify reduction of the proposed forfeiture." Jerry Szoka, 14 F.C.C. Rcd. at 20,150. Moreover, the Commission indicated that although its Compliance and Information Bureau had invited Szoka to supplement his financial information, he declined to do so. *Id.* at 20,150 n.2. Indeed, Szoka's counsel confirmed at oral argument that Szoka neither submitted the requested supplemental information nor requested a hearing at which to address the contradictions. We therefore find Szoka's inability-to-pay claim waived.

V.

The decision of the Federal Communications Commission is affirmed.

So ordered.

In re JERRY SZOKA Cleveland, Ohio
Order to Show Cause Why A Cease and
Desist Order Should Not Be Issued

CIB Docket No. 98-48

FEDERAL COMMUNICATIONS COMMISSION

14 FCC Rcd 9857; 1999 FCC LEXIS 2775

RELEASE-NUMBER: FCC 99-145

June 15, 1999 Released; Adopted June 10, 1999

DECISION

By the Commission

Appearances:

Hans Bader and James A. Moody on behalf of Jerry Szoka; and Pamera D. Hairston and W. Riley Hollingsworth on behalf of the Compliance and Information Bureau.

OPINION:

[*9857] I. INTRODUCTION

1. In this Decision, the Commission affirms the Summary Decision ("S.D") of Chief Administrative Law Judge Joseph Chachkin ("ALJ"), FCC 98D-3, released September 4, 1998, which orders Jerry Szoka to cease and desist from operating an unauthorized broadcast station in viola-

tion of Section 301 of the Communications Act of 1934, as amended, 47 U.S.C. § 301, prohibiting radio communications without a license, and imposes a monetary forfeiture of $ 11,000 for operating in violation of Section 301.

2. In an Order to Show Cause and Notice of Opportunity for Hearing ("OSC"), 13 FCC Rcd 10630 (1998), the Commission directed Szoka to show cause why he should not be ordered to cease and desist from violating Section 301 and designated the following issues for hearing:

To determine whether Jerry Szoka has transmitted radio energy without appropriate authorization in violation of Section 301 of the Act.

To determine whether, based on the evidence adduced pursuant to the preceding issue, Jerry Szoka should be ordered to cease and desist from violating Section 301 of the Act.

[*9858] The OSC also called for a determination, pursuant to Section 503(b) of the Act, 47 U.S.C. § 503(b), of whether an order of forfeiture in an amount not to exceed $ 11,000 should be issued against Szoka for violations of Section 301. n1

n1 The forfeiture amount was determined by using the statutory base amount $ 10,000 for the violation at issue (construction and/or operation without instrument of authorization for the service) which becomes $ 11,000 with the inflation adjustment pursuant to the Debt Collection Improvement Act of 1996, Public Law 104-134, 110 Stat. 1321-358 (1996). The maximum statutory forfeiture is $ 11,000 for each day of a continuing violation up to a total of $ 82,500 for each act or failure to act. See 47

U.S.C. § 503(b)(2)(C); 47 C.F.R. §§ 1.80(b)(3), (b)(4), (b)(5).

3. In the S.D., the ALJ summarily resolved the factual issue against Szoka on the basis of the Compliance and Information Bureau's June 10, 1998 Motion [**3] for Summary Decision and ordered him to cease and desist from violating Section 301. Additionally the ALJ concluded that Szoka's misconduct warranted a forfeiture in the amount of $ 11,000. By Memorandum Opinion and Order, FCC 98M-113, released September 4, 1998, the ALJ also denied Szoka's August 4, 1998 Motion to Enlarge Issues. Szoka has filed exceptions to the ALJ's rulings, and the Bureau has filed a reply.

II. BACKGROUND

A. Findings

4. Szoka is the owner and/or operator of "The Grid," a nightclub located at 1281 West 9th Street, in Cleveland, Ohio. Szoka operates a radio station known as "The Grid" or "Grid Radio" at that address. The station has transmitted on 96.9 MHz, which is in the FM broadcast band (88 MHz to 108 MHz), from November 4, 1996 to the present. Szoka states that his station went on the air in September 1995 and now broadcasts seven days a week. I.D., P3; Bureau Motion for Summary Decision, Exhs. 1, 2; Szoka Opposition to Motion for Summary Decision, at 1.

5. Szoka does not hold an authorization from the Commission to broadcast on 96.9 MHz. After receiving information on November 4, 1996 concerning Szoka's unauthorized radio operation, James A. Bridgewater, the Detroit

Field Office Director of the Compliance and Information Bureau, wrote warning letters to Szoka on February 20 and June 11, 1997. The letters informed Szoka that his operation of a radio station without a license violated Section 301 and could subject him to penalties including fine and/or imprisonment. Szoka did not cease his unauthorized operation after receipt of these letters. I.D., P4; Bureau Motion for Summary Decision, Exh. 3, Attachments A, C.

[*9859] 6. On September 11, 1997, FCC agents made field strength measurements of the signal identified as "The Grid." These measurements, which were made at approximately 171 meters from the transmitting antenna, recorded a value of 35.55 millivolts/meter (33,550 microvolts/meter). n2 This emission far exceeds the limit set forth in 47 C.F.R. § 15.239(b), which contains the only pertinent exception to the prohibition on unlicensed operation in the FM frequency band. This rule allows unlicensed operation of a low power radio transmitter in the FM band, provided that the signal strength of any such transmission does not exceed 250 microvolts/meter at a distance of 3 meters. Szoka's signal could be heard for approximately 19 miles. On March 19, 1998, FCC agents confirmed that the station was still operating. I.D., P4 n. 3, P6; Bureau Motion for Summary Decision, Exh. 4. n2 Szoka operates with an effective radiated power of 48.8 watts and at an antenna height of 80 feet HAAT. Szoka Opposition to Motion for Summary Decision, at 1 and Exhibit A.

B. The S.D.'s Conclusions

7. The ALJ concluded that summary decision was appropriate because there was no factual dispute requiring a

hearing. He found that Szoka did not have a license to operate a broadcast station, that Szoka admitted operating a radio station in Ohio, and that he admitted using power in excess of that permitted for unlicensed operation in the FM band. The S.D. rejected Szoka's contention that he was not required to comply with Section 301 because the Commission's refusal to license broadcast stations under 100 watts violates his First Amendment rights and is inconsistent with the Commission's statutory mandate to regulate in the public interest. The ALJ also disagreed with Szoka that the proposed forfeiture of $ 11,000 was unconstitutionally excessive. The S.D. concluded that the forfeiture was warranted because Szoka's violations were willful and repeated, even in the face of explicit warnings from Commission officials.

C. Exceptions

8. Szoka challenges the S.D. on the principal grounds that the Commission's "regulatory ban on microbroadcasters" violates the First Amendment because it imposes a prior restraint or unjustified content-based regulation, that the Commission's "refusal to license microbroadcasters such as Szoka" also violates the statutory requirement that the Commission efficiently use the radio spectrum in the public interest, and that the forfeiture imposed by the ALJ in this case is unconstitutionally excessive as well as a violation of the Small Business Regulatory Enforcement Fairness Act ("SBREFA"). Specifically Szoka argues that, although the Commission's rules currently ban "microbroadcasters" like himself, n3 he is serving the public interest by providing [*9860] his audience with programming that is not available elsewhere, and the Commission therefore should reconsider its prohibition. Szoka asserts that he may challenge the Commission's regulations as applied

to him, even though he never sought a license or a rule waiver, because any such application would have been futile and the regulations are constitutionally overbroad. Szoka also asserts that the Commission's ban is "essentially standardless," making it an unauthorized prior restraint in violation of the First Amendment. He argues that the regulations are not narrowly tailored and that there is available spectrum space to accommodate microbroadcasters. Szoka further maintains that the ban is too restrictive because it leaves him without ample alternative means of communicating with his audience, and that the waiver process is unduly burdensome for microbroadcasters. Next Szoka claims that the Commission's approach to microbroadcasting violates provisions of the Communications Act that require the Commission to maximize the number of users of the spectrum, eliminate gaps in coverage, and avoid unacceptable interference while guaranteeing diverse programming. With regard to the proposed forfeiture, Szoka claims that it violates the Eighth Amendment because it bears no relationship to the gravity of the offense. Szoka asserts that the forfeiture is so punitive that it violates his rights under the Fifth, Sixth, and Seventh Amendments as well. He also argues that SBREFA applies here because it requires federal agencies to reduce regulatory burdens on small businesses and provides for the reduction of civil penalties for violations of regulatory requirements. Finally he submits that he was entitled to a full hearing. n3 Szoka does not define microbroadcasting but appears to be referring to stations operating with less than 100 watts. The rules he cites, which he describes as "the Class D regulations," are 47 C.F.R. § 73.512(c) (except in Alaska, the Commission will not accept new applications from Class D noncommercial educational stations, which are defined as operating with no more than 10 watts); 47 C.F.R. § 73.211(a) (FM stations must operate with a mini-

mum effective radiated power of 100 watts); and 47 C.F-.R. § 73.511(a) (no new noncommercial educational station will be authorized with less than the minimum power requirement for Class A stations, which is 100 watts).

III. DISCUSSION

A. Procedural Rulings

9. Initially we agree with the ALJ that summary decision was appropriate in this case. Summary decision may be granted upon a showing that there is no genuine issue of material fact for determination at the hearing. 47 C.F-.R. § 1.251(a)(1), (d); Big Country Radio, Inc., 50 FCC 2d 967 (Rev. Bd. 1975). The Communications Act precludes any person from transmitting radio signals within the United States without a license. 47 U.S.C. § 301. Under the Commission's rules, low power transmissions in the 88 to 108 MHz band are exempt from FCC licensing requirements if the field strength of the emissions does not exceed 250 microvlts/meter at a distance of 3 meters. 47 C.F.R. § 15.239(b). There is no dispute here that Szoka has been broadcasting on 96.9 MHz since at least November 1996 without a license in violation of 47 U.S.C. § 301 and is continuing to do so. It is also undisputed that Szoka's operation exceeds [*9861] the permissible power limits specified in 47 C.F.R. § 15.239(b) for unlicensed facilities. Szoka has not shown what purpose a hearing would serve in these circumstances. Accordingly the ALJ correctly resolved the factual question of Szoka's unauthorized operation against him without the need for a hearing. n4

n4 Szoka asserts that the summary decision format gave no consideration to his ability to pay the proposed forfeiture.

We disagree that Szoka was precluded in any way from making such a showing to the ALJ in opposition to the Bureau's motion for summary decision. Nevertheless, in keeping with our recent forfeiture orders in other proceedings involving unauthorized operations of radio stations, cited at P22, infra, we will permit Szoka to submit a showing in support of any claim of inability to pay. See P26 n. 6, infra.

10. The ALJ also correctly denied Szoka's motion to enlarge issues. Szoka filed his motion more than two months beyond the time specified in 47 C.F.R. § 1.229(a) for the filing of such motions, and he did not establish good cause for the delay in filing pursuant to 47 C.F.R. § 1.229(b)(3). Moreover, Szoka's motion did not raise a question of probable decisional significance and substantial public interest importance, which is the only ground for consideration of a motion to enlarge on the merits in the absence of good cause for late filing. See 47 C.F.R. § 1.229(c). Szoka simply listed eight issues he wanted to add to the proceeding without providing any specific allegations of fact sufficient to support the action requested, let alone any supporting affidavit, as required by 47 C.F.R. § 1.229(d). Additionally, as the ALJ observed, Szoka's motion largely raised legal issues, rather than factual ones that are appropriate for hearing. In any event, Szoka's arguments, both legal and factual, are duplicative of matters that either were raised in opposition to the motion for summary decision and considered by the ALJ in his S.D., or that are raised in Szoka's Exceptions and considered in this opinion.

B. Section 301 Violation

11. Szoka defends his violation of Section 301 by argu-

ing that the Commission's rules barring unauthorized low power operations such as his violate the First Amendment and are inconsistent with our statutory mandate. We agree with the ALJ, however, that the Commission and the federal courts have considered and rejected similar, if not identical, arguments in other cases involving unlicensed broadcast operations. To begin with, the Commission has explained that Congress established a licensing system over 60 years ago in the Communications Act that requires any person who wishes to broadcast to submit an application in writing to the Commission, 47 U.S.C. § 308, and prohibits operation of a broadcast station without a license issued by the Commission. 47 U.S.C. § 301. A principal reason for requiring a license to broadcast is to prevent interference with broadcast signals so that the public may receive these signals. See Stephen Paul Dunifer, 11 FCC Rcd 718, 720 (1995); see also United States v. Dunifer, 997 F.Supp. 1235, 1241 (N.D. Cal. 1998), motion to alter or amend judgment denied, November 18, 1998, appeal pending, No. 99-15035 (9th Cir. 1999) (prohibition on unlicensed [*9862] broadcasting is constitutional). Because the radio spectrum is not large enough to accommodate an unlimited number of users, "where more than one broadcaster attempts to use the same radio frequency, interference results. Regulation therefore is essential to the orderly use of the nation's airwaves." United States v. Weiner, 701 F.Supp. 14, 16 (D. Mass. 1988), aff'd, 887 F.2d 259 (1st Cir. 1989).

12. As a constitutional matter, the Supreme Court repeatedly has affirmed that there is no First Amendment right to broadcast without a license and that the Commission has authority to regulate the radio spectrum. See Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 388 (1969) ("Where there are substantially more individuals who

want to broadcast than there are frequencies to allocate, it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish."); National Broadcasting Co. v. United States, 319 U.S. 190, 227 (1943) ("The right of free speech does not include, however, the right to use the facilities of radio without a license. The licensing system established by Congress in the Communications Act of 1934 was a proper exercise of its power over commerce-."); accord, FCC v. National Citizens Committee for Broadcasting, 436 U.S. 775, 798-802 (1978) (citing Red Lion); Columbia Broadcasting System v. Democratic National Committee, 412 U.S. 94, 101 (1973) (citing Red Lion); see also Turner Broadcasting System, Inc. v. FCC, 512 U.S. 622, 637 (1994) ("The scarcity of broadcast frequencies thus required the establishment of some regulatory mechanism to divide the electromagnetic spectrum and assign specific frequencies to particular broadcasters."); Turro v. FCC, 859 F.2d 1498, 1500 n. 2 (D.C. Cir. 1988) (denial of request for waiver of rule prohibiting program origination by FM translator station "presents no First Amendment issues different from those raised by any other denial of authorization to broadcast"); Creation of a Low Power Radio Service, FCC 99-6, released February 3, 1999 at n. 16 (dismissing assertion that First Amendment guarantees individuals the right to operate a low power radio station).

13. Hence Szoka's contentions that he serves a niche audience that is not otherwise being served adequately by licensed broadcasters and that he has no alternative outlet for reaching his audience, even if valid, would not give him a right to broadcast without a license and in contravention of the Commission's rules. The same is true of Szoka's claim that there is sufficient spectrum space

to accommodate microbroadcasters. See United States v. Weiner, 701 F.Supp. at 16 ("Even if the [broadcast] band were 'empty,'" First Amendment would not provide "authority to broadcast . . . in violation of . . . federal . . . law"). Szoka also contends that he has made "every effort" to avoid interference with broadcast operations and that the Bureau has not alleged that his signal actually causes interference to licensed services. Exceptions at 3. As we have explained previously, however, the licensing requirement of Section 301 may be enforced without a specific showing that the unlicensed radio transmission in question causes harmful interference. See Stephen Paul Dunifer, 11 FCC Rcd at 727.

14. In view of the constitutionality of the Commission's licensing requirement, Szoka was obliged to apply for a license in accordance with the Communications Act together with a fully [*9863] supported request for waiver of the relevant rules that limit low power radio service. Id. at 721. Had he requested a waiver, and had his request been denied, he could have appealed to the United States Court of Appeals for the District of Columbia Circuit pursuant to 47 U.S.C. § 402(b)(1). Alternatively, Szoka could have petitioned for rulemaking, pursuant to 47 C.F.R. § 1.401, to alter the existing low power FM rules or to seek allocation of a channel that would permit operation at the power he sought. If his petition had been denied, he could have sought review in any court of appeals under 47 U.S.C. § 402(a). See Free Speech v. Reno, No. 98 Civ. 2680, slip op. at 8 (S.D.N.Y. March 18, 1999) (1999 WL 147743). Szoka did not seek a license or a rule waiver, however. As a consequence, he lacks standing to challenge the applicability to him of the regulations in federal court. See United States v. Neset, 10 F.Supp.2d 1113, 1115 (D.N.D. 1998); United States v. Dunifer, 997

F.Supp. at 1240.

15. Szoka maintains that it would have been futile for him to file a license application and a request for waiver because the Commission has made clear that it is unwilling to license microbroadcasters. We disagree with this view. The Commission is required to give serious consideration to an applicant's meritorious request for a rule waiver, including non-frivolous constitutional arguments presented to it. See Meredith Corp. v. FCC, 809 F.2d 863, 874 (D.C. Cir. 1987); WAIT Radio v. FCC, 418 F.2d 1153, 1156 (D.C. Cir. 1969). And, in fact, the Commission has granted waivers to low power broadcasters in the past. See Turro v. FCC, 859 F.2d at 1500 n. 1 (citing two such instances); see also United States v. Dunifer, 997 F.Supp. at 1240-41 (citing Turro and rejecting futility argument).

16. In any event, we disagree with Szoka that the Commission's rules prohibiting low power operation violate the First Amendment. Thus we disavow Szoka's view that the rules are overbroad and "standardless." Federal courts have rejected this contention in other cases. In WAIT Radio v. FCC, 418 F.2d at 1156-57, as noted above, the court of appeals held that, where the Commission denies an applicant's waiver request, it must give serious consideration to the request, including adequately supported and non-frivolous First Amendment claims. The court additionally stated that the Commission must "articulate with clarity and precision its findings and the reasons for its decisions." Id. Subsequent district court decisions have held that these mandatory judicial guidelines, within the context of the Commission's obligation to administer in the public interest, provide sufficient standards for the Commission to decide whether to grant or deny a waiver application, and, further, that the Commission's regulatory

scheme sets forth adequate procedures for processing license applications and waiver requests, and it provides for judicial review of any improper [**18] Commission ruling. Therefore these courts have concluded that the regulations are not overbroad. See United States v. Dunifer, 997 F.Supp. at 1243-44; United States v. Neset, 10 F.Supp.2d at 1115-16.

17. Furthermore, contrary to Szoka's description of our low power licensing regulations, the Commission's technical rules, which, among other things, impose requirements on the power levels of FM stations, are not content-based and, hence, must only be reasonably related to the statutory objectives contained in the Communications Act to pass muster under the First [*9864] Amendment. See FCC v. National Citizens Committee for Broadcasting, 436 U.S. at 802; Stephen Paul Dunifer, 11 FCC Rcd at 721 (holding that the rules are reasonable and meet the constitutional standard). For the reasons that follow, we continue to believe that these rules are reasonable.

18. In the Act, Congress mandated that "the Commission shall make such distribution of licenses, frequencies, hours of operation, and power among the several States and communities as to provide a fair, efficient, and equitable [**19] distribution of radio services to each of the same." 47 U.S.C. § 307(b). See also 47 U.S.C. § 303(a)--(d) (Commission shall, as the public interest requires, classify radio stations, prescribe the nature of service to be rendered by radio stations, assign frequencies for stations, and determine locations of stations). In accordance with Congress's directive, and notwithstanding Szoka's claim that the Commission has not met its statutory obligation to efficiently use the radio spectrum in the public interest, the Commission has allotted stations to communities through-

out the United States and has assigned their frequency and power levels to accommodate the goals of utilizing the spectrum efficiently, achieving a wide distribution of stations, allowing each station to serve as many people as possible, and allowing numerous stations to be licensed. See Revision of FM Broadcast Rules, Particularly as to Allocation and Technical Standards, 40 FCC 747, 753-57 PP15-22 (1963). Moreover, through rulemaking, the Commission has fashioned a licensing system that serves a wide range of conditions and is adaptable to changing circumstances, but which avoids extremes in permissible power. Thus, the Commission curtails low power FM broadcasting because of spectrum efficiency considerations, but we also limit the size of stations and do not permit the highest power possible because that would reduce the number of stations and undermine the Commission's goal of promoting diversity of voices. See Stephen Paul Dunifer, 11 FCC Rcd at 724.

19. The Commission has explained that the rules pertaining to low power broadcast services are reasonably related to our statutory objective of achieving "a fair, efficient, and equitable distribution of radio services" in the United States, pursuant to 47 U.S.C. § 307(b), and are designed to permit the most efficient use of the spectrum. See Stephen Paul Dunifer, 11 FCC Rcd at 721-25 (discussing in detail the history of the Commission's rulemaking proceedings examining the issue of low power broadcasting and the Commission's concerns with matters of signal interference, spectrum efficiency, and preclusion). With regard to Szoka's suggestion that we revisit our rules, we note that the Commission recently adopted a Notice of Proposed Rule Making to explore the possible authorization of new, low power FM radio stations, including the creation of a 100-watt secondary service. See

Creation of a Low Power Radio Service, FCC 99-6, at 1. We did so in recognition of the growth in radio ownership consolidation over the past few years as a result of the liberalization of our local radio ownership rules, and in response to the increasing public demand for additional outlets of public expression which could expand the diversity of voices. Id. at 6, 40. In so doing, we stated that we are "mindful of the technical requirements necessary to protect existing radio service and are concerned with preserving the excellent technical quality of radio service available today which [*9865] has been fostered and maintained by our existing rules." Id. at 40. The proposed rules are prospective in nature, of course, and are totally separate from the Commission's repeated efforts, as here, to terminate all unlicensed radio operations. Moreover, the Commission has not yet decided whether parties who, like Szoka, have persisted in unlawful broadcast operations, even after Commission officials have issued repeated warnings and the Commission has initiated enforcement action, possess the requisite character qualifications to be eligible for a license in any new radio service. Id. at 27-28.

C. Forfeiture

20. Turning next to Szoka's objections to the assessment of an $ 11,000 forfeiture for his unauthorized operation, we reject first Szoka's claim that the proposed forfeiture violates the Excessive Fines clause of the Eighth Amendment. n5 To support his position, Szoka cites U.S. v. Bajakajian, 118 S. Ct. 2028 (1998), where the court held that a "punitive forfeiture" is unconstitutional if it is "grossly disproportional" to the gravity of the offense charged. Id. at 2036. Even assuming, arguendo, that a monetary forfeiture imposed by the Commission pursuant to 47 U.S.C. §

503(b) implicates the Eighth Amendment, for the reasons stated below we do not find that the forfeiture ordered by the ALJ in this case is excessive or out of proportion to Szoka's violation of Section 301.

n5 "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." U.S. Const., Amend. VIII.

21. We have stated that unlicensed operation of a radio transmitter in violation of Section 301 is a serious violation of the Act. See Madison Communications, Inc., 8 FCC Rcd 1759 (1993); Data Investments, Inc., 6 FCC Rcd 4496 (1991). In determining the forfeiture amount in this case, we have considered the factors set forth in 47 U.S.C. § 503(b)(2)(D), including the nature, circumstances, extent, and gravity of the violations. Szoka has operated his radio station without a license since at least November 1996, and perhaps as early as September 1995, and continues to operate his facility. Moreover, he has been informed explicitly by the Bureau that his unlicensed operation is in violation of the Communications Act. In addition, Szoka has not made any good faith effort to come into compliance with the law even after being told that his transmissions are illegal. Thus his violations are serious, willful, and repeated. Although Szoka argues that his violation of the Act is not willful because he believes he is acting lawfully, we have explained that the term "willful" means that the person "knew he was doing the act in question, regardless of whether there was an intent to violate the law." See Southern California Broadcasting Co., 6 FCC Rcd 4387, 4387-88 (1991) (quoting Conference Report accompanying amendment clarifying definition of willful in 47 U.S.C. § 312(f), which definition also applies [*9866] to 47 U.S.C. § 503(b)). n6 In these

circumstances, we conclude that $ 11,000 is the appropriate forfeiture amount. This forfeiture is identical to that imposed by the Commission in three other recently concluded show cause proceedings involving similar unauthorized operations of radio stations in violation of Section 301. See Mark A. Rabenold, FCC 98-325, released December 11, 1998; Lewis B. Arnold, FCC 98-326, released December 11, 1998; Keith Perry, FCC 98-327, released December 23, 1998.

n6 "The term 'willful', when used with reference to the commission or omission of any act, means the conscious and deliberate commission or omission of such act, irrespective of any intent to violate" the Act or the Commission's rules. 47 U.S.C. § 312(f).

22. Additionally we disagree with Szoka that the forfeiture violates other constitutional safeguards. Specifically, in the OSC, Szoka was provided notice and an opportunity for hearing before a Commission ALJ pursuant to 47 U.S.C. § 503(b). Furthermore, the OSC constituted a Bill of Particulars with respect to all issues. Szoka also has been represented by counsel of his choice before the ALJ and the Commission. And Szoka's assertion of his right against self-incrimination is not relevant because this is not a criminal proceeding. See Stephen Paul Dunifer, 11 FCC Rcd at 729 (rejecting similar claims that due process, or Fifth or Sixth Amendment rights were violated in Section 503(b) forfeiture proceeding against unlicensed broadcaster).

23. Finally, Szoka's reliance on SBREFA is unavailing. Section 223 of SBkEFA, enacted as part of the Contract With America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996), requires agencies to estab-

lish a policy providing for the reduction and, where appropriate, the waiver of civil penalties imposed on small entities. As part of this policy, under appropriate circumstances, agencies may consider the entity's ability to pay. In establishing this policy, agencies additionally may consider certain specific conditions and exclusions listed in Section 223. In amending our rules to adopt our forfeiture guidelines, we made clear that our existing policies comply with Section 223 of SBREFA. Thus, under 47 U.S.C. § 503(b)(2)(D) and 47 C.F.R. § 1.80 (b)(4), we consider inability to pay as a relevant factor in assessing forfeitures. And our other upward and downward adjustment criteria encompass many of the conditions and exclusions listed in Section 223 of SBREFA. See The Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines, 12 FCC Rcd 17087, 17109 (1997) (petitions for recon. pending). In this case, the ALJ correctly noted that, under Section 223(b)(4) of SBREFA, willful violations may be excluded from the policy's applicability, and we note further that, under Section 223(b)(6), requiring good faith efforts to comply with the law may be made a condition of the policy's applicability. In view of Szoka's willful conduct in operating an unlicensed radio station in direct violation of Section 301 and his failure to make any good faith effort to comply with the law, even after being told by the Bureau that the operation was illegal, he cannot look to SBREFA to provide relief from the forfeiture imposed by the ALJ.

[*9867] IV. ORDERING CLAUSES

24. ACCORDINGLY, IT IS ORDERED That, pursuant to 47 U.S.C. § 312(b), Jerry Szoka, and all persons in active concert or participation with him, SHALL CEASE

AND DESIST from making unauthorized radio transmissions in violation of 47 U.S.C. § 301.

25. IT IS FURTHER ORDERED That, pursuant to 47 U.S.C. § 503(b), Jerry Szoka SHALL FORFEIT to the United States the sum of eleven thousand dollars ($ 11,-000) for willful violation of 47 U.S.C. § 301. n7 Payment of the forfeiture may be made by mailing a check or similar instrument, payable to the Federal Communications Commission, within forty (40) days of the release date of this Decision, to Federal Communications Commission, P.O. Box 73482, Chicago, IL. 60673-7482.

n7 A claim of inability to pay should be supported by tax returns or other financial statements prepared under generally accepted accounting principles for the most recent three year period. This information must be submitted within thirty (30) days of the release of this Decision to FCC, Compliance and Information Bureau, Compliance Division, 445 12th Street, S.W., Washington, D.C. 20554.

26. IT IS FURTHER ORDERED That a copy of this Decision shall be sent to Jerry Szoka by Certified Mail - Return Receipt Requested.

27. IT IS FURTHER ORDERED That this proceeding IS TERMINATED.

Magalie Roman Salas
Secretary

In re JERRY SZOKA Cleveland, Ohio;
Order to Show Cause Why A Cease and
Desist Order Should Not Be Issued

CIB Docket No. 98-48

FEDERAL COMMUNICATIONS COMMISSION

14 FCC Rcd 20147; 1999 FCC LEXIS 5186

RELEASE-NUMBER: FCC 99-297

October 19, 1999 Released; Adopted October 14, 1999

ORDER

By the Commission:

[*20147] 1. This Order denies a Petition for Reconsideration filed July 15, 1999 by Jerry Szoka. Szoka seeks reconsideration of a Decision, Jerry Szoka, FCC 99-145, released June 15, 1999, in which the Commission ordered Szoka to cease and desist from operating an unauthorized broadcast station in violation of Section 301 of the Communications Act of 1934, as amended, 47 U.S.C. § 301, which prohibits unlicensed radio communications, and imposed a monetary forfeiture of $ 11,000 for operating in violation of Section 301. We also reject Szoka's request, which he incorporates in his Petition, that we stay this proceeding.

2. In our Decision, we found that Szoka has been operating a radio station in the FM frequency band in Cleveland, Ohio without a license since November 1996. Even though Szoka was informed by FCC officials in 1997 that his operation was illegal, he has continued to operate the station. Szoka defended his unlicensed operation by contending that the Commission's "regulatory ban on microbroadcasters" like himself -- those who operate with less than 100 watts -- violated his free speech rights, but our Decision explained in detail that Szoka's assertions were similar in essential respects to those considered and rejected by the Commission and the courts in other cases involving unlicensed operations. In imposing a forfeiture for Szoka's unlicensed operation, we also rejected Szoka's argument that the forfeiture violated his constitutional rights and the Small Business Regulatory Enforcement Fairness Act. Among other things, we pointed out that Szoka engaged in willful conduct in operating an unlicensed station in violation of Section 301 and failed to make any good faith effort to comply with the licensing requirement.

3. In his Petition, Szoka initially cites to the Commission's Notice of Proposed Rulemaking, Creation of a Low Power Radio Service, 14 FCC Rcd 2471 (1999), which proposes the possible authorization of new, low power FM radio stations, and requests that the [*20148] cease and desist order in this proceeding be stayed pending completion of the rulemaking. In an attached Supplemental Declaration. Szoka asserts that his programming serves a public need and should not be removed from the air during the pendency of the rulemaking. Alternatively, Szoka requests a stay so that he can submit and receive approval of an application for license and request for rule waiver. In support of reconsideration of our Decision, Szoka argues

that he has standing to challenge the Commission's licensing scheme, which he contends is overly broad, and that the Commission did not address his constitutional objection that the licensing scheme violates Szoka's First Amendment rights. Szoka further maintains that the $ 11,000 forfeiture is unconstitutionally excessive in violation of the Eighth Amendment because it bears no relationship to the gravity of the offense charged. In this regard, Szoka argues that the Commission erred in concluding that his conduct was willful because it was FCC policy, not his unwillingness, that prevented him from obtaining a license. Finally, Szoka contends that the monetary fine for his unlicensed operation should be reduced to $ 1 because he is unable to pay the proposed forfeiture, and he submits recent tax returns and a personal financial statement in support of his claim. The Compliance and Information Bureau opposes Szoka's petition, including his requests for a stay and for reduction of the forfeiture.

4. We deny Szoka's Petition in all respects. First, with regard to Szoka's request that we stay our underlying Decision and the cease and desist order until completion of the FM low power rulemaking proceeding or such time as Szoka applies for and receives licensing approval, we point out that the Commission's rules governing requests for stay mandatorily require that such requests be filed separately. The pertinent rule provision states:

Any request to stay the effectiveness of any decision or order of the Commission shall be filed as a separate pleading. Any such request which is not filed as a separate pleading will not be considered by the Commission.

47 C.F.R. § 1.44(e). Because Szoka incorporated his stay request in his Petition for Reconsideration, his request for

stay may not be considered.[1] n1 In any event, apart from being procedurally defective, Szoka's stay request is also deficient because in seeking to continue his violation of law it does not address any of the elements of the multi--part showing traditionally applied to stay motions, i.e., likelihood of success on the merits, irreparable injury, no harm to other interested parties, and the public interest. See Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc., 559 F.2d 841, 842-43 (D.C. Cir. 1977); Virginia Petroleum Jobbers Ass'n. v. FPC, 259 F.2d 921, 925 (D.C. Cir. 1958).

[*20149] 5. A petition for reconsideration must be based on new facts, changed circumstances, or material errors or omissions in the underlying opinion. See 47 C.F.R. § 1.106(c) and (d). The Commission does not grant reconsideration simply for the purpose of reviewing matters which it has already considered and resolved. See WWIZ, Inc., 37 FCC 685 (1964), aff'd sub nom. Lorain Journal Co. v. FCC, 351 F. 2d 824 (D.C. Cir. 1965), cert. denied, 383 U.S. 967 (1966). We agree with the Bureau that Szoka does not present a sufficient basis for reconsideration because his Petition largely reiterates the same arguments that the Commission previously considered and rejected.

6. We explained in our Decision that the Commission's

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[1] The Bureau noted this defect in its opposition pleading. Bureau Opposition at 2. Nevertheless, although the rules governing petitions for reconsideration permit the filing of replies to oppositions, see 47 C.F.R. § 1.106(h), and there is no temporal limitation on the filing of petitions for stay, Szoka did not file a reply pleading or file any separate request for stay.

rules governing low power operations do not violate Szoka's First Amendment rights and are not inconsistent with our statutory mandate. Specifically, we pointed out that the Supreme Court, the lower federal courts, and the Commission have all made clear that there is no First Amendment right to broadcast without a license and that this is true for low power operations as well as for other radio stations. In view of the settled constitutionality of the licensing requirement, we stated that Szoka should have applied for a license and requested a waiver of the rules limiting low power service if he wished to broadcast, but he did not do so. We also rejected Szoka's assertions, which he now repeats, that it would have been futile to seek a license and that the rules are unconstitutionally overbroad or standardless. And we explained that the low power broadcast rules are reasonably related to our statutory objective of achieving "a fair, efficient, and equitable distribution of radio services" in the United States, pursuant to 47 U.S.C. § 307(b), and are designed to permit the most efficient use of the spectrum.

7. Insofar as Szoka now appears to rely on the pending FM low power rulemaking, Creation of a Low Power Radio Service, to provide him substantive relief from the cease and desist order in this proceeding (Petition at 11), we emphasize again that the outcome of the rulemaking is distinct from the issue of Szoka's own misconduct. As we stated in our Decision at ¶ 19:

> The proposed rules are prospective in nature, of course, and are totally separate from the Commission's repeated efforts, as here, to terminate all unlicensed radio operations. Moreover, the Commission has not yet decided whether parties who, like Sz-

> oka, have persisted in unlawful broadcast operations, even after Commission officials have issued repeated warnings and the Commission has initiated enforcement action, possess the requisite character qualifications to be eligible for a license in any new radio service.

8. With respect to Szoka's constitutional objection to the proposed forfeiture of $ 11,000, our Decision carefully explained why the forfeiture amount in this case is not excessive or out of proportion in view of Szoka's serious, willful, and repeated violations of Section 301. In this regard, contrary to Szoka's assertion that his conduct was not willful, we provided a definition of the term "willful" to make clear that it refers to Szoka's knowing and deliberate operation of [*20150] an unlicensed broadcast station, irrespective of Szoka's intent to violate the law.

9. Finally, as for Szoka's request that we reduce the forfeiture amount to $ 1 because of his inability to pay, we do not find that the financial documentation and other information submitted by Szoka with his Petition is sufficient to justify reduction of the proposed forfeiture. According to his personal financial statement, dated July 13, 1999, Szoka has $ 8,500 in assets and a weekly salary of $ 204 which, according to his Supplemental Declaration, derives from The Grid nightclub, the locus of Szoka's radio station. Szoka's 1997 federal income tax return shows adjusted gross income of $ 13,005 and his 1998 federal income tax return shows adjusted gross income of $ 11,119. In addition his 1996 and 1997 tax returns indicate that Szoka is self-employed as an electrician. His personal financial statement also indicates that Szoka has a 37% ownership interest in The Grid and a 1/12 interest in

Wollen Mill, a commercial building. Szoka describes both these interests in his Supplemental Declaration as having "no current market value." He also states that his radio equipment has no present market value.

10. Although Szoka's stated assets and income do not appear to be large, we do not believe he has submitted sufficient objective evidence and supporting information to sustain his claim that they are so inadequate as to render him unable to pay a forfeiture. Nor, on their face, do they appear to be so. Thus, notably, although Szoka asserts that his commercial property interests and radio equipment have no value, it is not self-evident that this is the case, and Szoka offers no explanation or substantiation for these questionable claims or for the implication that these assets are unavailable to assist in paying the fine. Furthermore, as the Bureau notes, in spite of his assertions, Szoka's personal financial statement indicates that he has unpaid property taxes. The Bureau additionally points out that Szoka's personal financial statement also indicates that he owes federal taxes, but his federal tax returns indicate a refund for each of the last three years. Szoka offers no explanation for these apparent contradictions.[2] We therefore conclude that Szoka's showing is insufficient to justify a reduction in the forfeiture. See Bear Communications, Inc., 12 FCC Rcd 18108, 18109 (CIB 1997) (forfeiture not excessive compared to gross income over three years); Q. M. Tomlinson, Inc., 12 FCC Rcd 2981, 2982 (CIB 1997) (insufficient information to support inability to pay).

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[2] In its opposition pleading, the Bureau expressly stated that further documentation was required from Szoka to resolve these questions (Bureau Opposition at 5), but Szoka did not take the opportunity to file a reply pleading to provide such information.

[*20151] 11. ACCORDINGLY, IT IS ORDERED That the Petition for Reconsideration filed July 15, 1999 by Jerry Szoka IS DENIED.

Magalie Roman Salas

Secretary

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. JERRY SZOKA, Defendant-Appellant.

No. 00-3274

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

260 F.3d 516

June 14, 2001, Argued

July 30, 2001, Decided

July 30, 2001, Filed

PRIOR HISTORY:

Appeal from the United States District Court for the Northern District of Ohio at Cleveland. No. 99-02008. Kathleen McDonald O'Malley, District Judge.

DISPOSITION:

AFFIRMED.

COUNSEL:

ARGUED: Mark I. Wallach, CALFEE, HALTER & GRISWOLD, Cleveland, Ohio, for Appellant.

Mark S. Davies, UNITED STATES DEPARTMENT OF JUSTICE, CIVIL DIVISION, APPELLATE SECTION, Washington, D.C., for Appellee.

ON BRIEF: Mark I. Wallach, CALFEE, HALTER &

GRISWOLD, Cleveland, Ohio, James M. Moody, KELLY & POVICH, Washington, D.C., for Appellant.

Susan Pacholski, Jacob M. Lewis, UNITED STATES DEPARTMENT OF JUSTICE, CIVIL DIVISION, APPELLATE SECTION, Washington, D.C., for Appellee.

JUDGES:
Before: BOGGS and SUHRHEINRICH, Circuit Judges; and CLELAND, District Judge. *

* The Honorable Robert H. Cleland, United States District Judge for the Eastern District of Michigan, sitting by designation.

OPINION:

[*518]

BOGGS, Circuit Judge. Defendant Jerry Szoka appeals the district court's decision permanently enjoining him from making unauthorized radio transmissions in violation of 47 U.S.C. § 301. For the following reasons, we affirm.

I

In September 1995, Szoka, a licensed electrician and former technical adviser at a college radio station, began operating Grid Radio on an empty frequency, 96.9 FM, with a low-power output of 48.8 watts in Cleveland, Ohio. The station was named for "The Grid," a Cleveland nightclub that Szoka partially owns. While it was on the air, Grid Radio billed itself as a non-profit, community-oriented, all-volunteer broadcast station. The station primarily played dance music, but also served the information and

entertainment needs of the gay, lesbian, and arts communities of Cleveland.

Szoka did not apply for a broadcast license from the Federal Communications Commission (FCC) as required by the Communications Act of 1934 ("the Communications Act" or "the Act"), 47 U.S.C. § 301. Szoka asserts that he did not apply [*519] for a license because of the FCC's ban on low-power (or microradio) FM stations,[1] a ban that he claims violates the First Amendment and the Act.

On January 27, 2000, the FCC adopted new rules regarding low-power broadcasting. See Creation of Low Power Radio Service, 15 FCC Rcd 2205, 2000 WL 85304 (released Jan. 27, 2000). Pursuant to the new rules, two new classes of noncommercial educational FM radio stations are to be created, one at a maximum of 10 watts and one at a maximum of 100 watts. Individuals who continued to engage in unlicensed broadcasting after February 26, 1999, or who refused to stop unlicensed operations "within 24 hours of being advised by the Commission to

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[1] The FCC grants FM broadcast licenses under four separate classifications (A through D) depending upon factors such as transmission power, antenna height, and the area or place from which the broadcast is emanating. 47 C.F.R. § 73.210 et seq. Class D licenses are allocated to so-called "microbroadcast" low-power FM stations that operate at a power level of less than 100 watts and an approximate reception area of between two to twelve miles radius from the point of transmission. Under regulations in effect from 1978 until early 2000, the FCC forbade the issuance of all future Class D licenses, with certain limited exceptions. 47 C.F.R. §§ 73.211(a), 73.511(a), 73.512(c).

do so" would be ineligible for a low-power license under the new rules. *See id.* at para. 54.

In legislation signed into law in late 2000, Congress mandated an even more stringent ban on the ability of past unlicensed broadcasters to obtain low-power FM licenses. In response to this legislative mandate, the FCC recently modified its rules to "prohibit any applicant from obtaining a low-power FM license if the applicant has engaged in any manner in the unlicensed operation of any station in violation of section 301 of the Communications Act of 1934." Creation of a Low Power Radio Service, 2001 FCC LEXIS 1760, FCC No. 01-100, 2001 WL 310997, at para. 10 (released Apr. 2, 2001).

Szoka had the opportunity to file an application for a low-power FM license during the FCC's filing window for applications from Ohio, which was in January 2001. See Low Power FM Filing Window, 15 FCC Rcd 24817, FCC No. 00-2831, 2000 WL 1843397 (Dec. 15, 2000). The list of applications released by the FCC indicates that the Szoka did not apply for a license during this filing window. See Broadcast Applications, 2001 FCC LEXIS 2021, FCC No. 24962, 2001 WL 367588 (Apr. 12, 2001). Even if Szoka had applied, the FCC's rule prohibiting past unlicensed broadcasters from obtaining a low-power FM license would effectively bar Szoka's application. See FCC No. 01-100, 2001 WL 310997, at para. 11 (stating that the FCC "will dismiss those applications now on file that responded 'No' to FCC Form 318 [the low-power FM license application form], Section III, Question 8(a)," which "requests applicants to certify that neither the applicant nor any party to the application engaged in any manner in the unlicensed operation of any station in violation of Section 301 of the Communications Act of 1934, as

amended").

Szoka describes Grid Radio as offering a valuable public service while not interfering with other broadcast outlets. He states that Grid Radio was serving a niche audience and demonstrating the need for and value of low-power FM radio stations.[2] Szoka provides the court with favorable comments from letters and e-mails sent to Grid Radio by numerous individuals in order to demonstrate the impact Grid Radio had on its listeners. Szoka also asserts that he chose an empty frequency, low-power output, and a relatively low antenna height in order not to cause harmful interference while providing his audience with a quality signal.

Grid Radio was on the air without commercial interruption seven days a week, [*520] from 4 p.m. to 3 a.m. Monday through Friday, with broadcasts beginning at 1 p.m. on weekends. In addition to broadcasting dance music that it claims is unavailable in the Cleveland market, Grid Radio broadcast a three-hour weekly program entitled "The Beat Boys," which provided news and interviews pertinent to the gay community, dealt with issues

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[2] Szoka describes himself as "part of a grass-roots movement of microradio 'pioneers' (called 'pirates' by the FCC and the National Association of Broadcasters)" who, through "'broadcast civil disobedience'" attempt to "demonstrate the need and viability of microradio, as well as the unlawfulness of the FCC's regulatory ban on small stations." Defendant-Appellant's Brief at 17 n.4 (citing Greg Ruggiero, Microradio Broadcasting: Aguascalientes of the Airwaves, Z Magazine, at 25 (Dec. 1998) (quoting Noam Chomsky); Jim Cullen, Pirate Radio Fights for Free Speech, The Progressive Populist (April 1998)).

such as gay marriage and hate crimes, and promoted local artistic and entertainment events. Grid Radio also had a community bulletin board and made routine public service announcements regarding AIDS awareness and testing, safe sex, housing issues, and counseling services. Szoka describes the station as providing an effective "counterspeech" voice against hate speech and homophobic humor on other Cleveland radio stations.

On November 4, 1996, the Detroit Field Office of the FCC's Compliance and Information Bureau received a complaint from Mark Krieger of the Northeast Ohio Society of Broadcast Engineers regarding Grid Radio's unauthorized operation. On February 20, 1997, the office sent a letter warning Grid Radio that unlicensed broadcasting violated the Communications Act. The FCC warned Grid Radio that its operator could be subject to statutory sanctions and ordered that "operation of radio transmitting equipment without proper authority granted by the Commission should cease immediately." On June 11, 1997, the FCC sent the station a second warning letter. Although Szoka admits that he received these letters, he did not stop broadcasting as Grid Radio.

On April 6, 1998, after confirming that the station was still on the air, the FCC released an Order to Show Cause why Szoka "should not be ordered to CEASE AND DESIST from violating Section 301 of the Act." In re Jerry Szoka Cleveland, Ohio, 13 FCC Rcd 10630, FCC No. 98--64, 1998 WL 153227, at para. 7 (Apr. 6, 1998). The FCC acted pursuant to its power under 47 U.S.C. § 312(b) to issue cease and desist orders as a means of enforcing the licensing requirement and other provisions of the Act. On September 4, 1998, an administrative law judge issued a summary decision finding that there were no

genuine issues of material fact, since Szoka admitted operating a radio station and did not have a license to do so. In re Jerry Szoka Cleveland, Ohio, 1998 FCC LEXIS 4563, FCC No. 98 D-3, 1998 WL 559385 (Sept. 4, 1998). The administrative law judge rejected Szoka's arguments that he was not required to obtain a license because the FCC regulations prohibiting the licensing of low-power radio stations violated the First Amendment and were inconsistent with the Commissioner's statutory mandate to regulate in the public interest. *Id.* at paras. 9-10.

The FCC affirmed the administrative law judge's decision on June 15, 1999. In re Jerry Szoka Cleveland, Ohio, 14 FCC Rcd 9857, FCC No. 99-145, 1999 WL 386918 (June 15, 1999). The Commission stated that "the Supreme Court repeatedly has affirmed that there is no First Amendment right to broadcast without a license and that the Commission has authority to regulate the radio spectrum." *Id.* at para. 12. Szoka filed a petition to reconsider with the FCC, which the Commission denied on October 19, 1999. In re Jerry Szoka Cleveland, Ohio, 14 FCC Rcd 20147, FCC No. 99-297, 1999 WL 867680 (Oct. 19, 1999)

On November 17, 1999, Szoka filed a notice of appeal of the FCC's cease and desist order in the United States Court of Appeals for the District of Columbia Circuit. Szoka directed his appeal to the D.C. Circuit as required by 47 U.S.C. § 402(b)(7). That litigation is still pending as Case Nos. 99-1463 and 99-1527 and is scheduled for oral argument in September 2001. [*521]

Even though the cease and desist order was entered against Szoka, Grid Radio remained on the air. In order to compel compliance with the cease and desist order, the

United States filed suit in the United States District Court for the Northern District of Ohio pursuant to 47 U.S.C. § 401(b). The FCC requested a preliminary and permanent injunction to stop Szoka from continuing to broadcast without a license. After a combined preliminary injunction hearing and trial on the merits, the district court ruled in favor of the government and entered an injunction ordering Szoka to stop broadcasting by March 1, 2000.

The district court indicated that because Congress had provided a statutory basis for an injunction, the government need only show that the statutory requirements were met in order for an injunction to be issued. The district court stated that even if it were to engage in an equitable balancing of harms and to take into account the public interest, the factors would weigh in favor of the United States and would mandate the entry of the injunction. The court concluded that an injunction was necessary because, "if radio stations could broadcast without a license so long as they claim to serve some segment of the public not currently being served by other radio stations, the structure set up by Congress in the Communications Act ... to stop a 'cacophony of competing voices, none of which could be clearly and predictably heard,' without some control, would be impotent." The court stated that "even if Szoka is correct in his belief that the FCC's regulations ... are unconstitutional, Szoka has no right to simply broadcast without a license."

The court nevertheless went on to opine on the FCC's regulations, stating in dicta that, "based on the limited record before it, the Court is inclined to agree that the FCC's non-commercial low-power broadcasting ban smacks of favoritism towards wealthier interest groups who do not wish to share the airwaves with non-commer-

cial stations." It appeared to the court that the FCC's ban on low-power stations would run "contrary to the FCC's obligation to distribute the airwaves in a manner that furthers the 'public interest' and, thus, would be inconsistent with the First Amendment." The court concluded, however, that "this is not the correct forum to bring a direct challenge to the FCC's ban on low-power radio, making this Court's view of that ban irrelevant." The court noted that the D.C. Circuit is the proper forum for such claims, which Szoka can make in arguing that the cease and desist order should be lifted.

On February 29, 2000, the district court denied Szoka's motion to suspend the injunction. On March 1, 2000, Szoka filed a timely notice of appeal and an emergency motion to stay the injunction pending appeal. This court denied Szoka's emergency motion on March 10, 2000.

II

A

This court reviews the grant of a preliminary and permanent injunction to determine whether the district court abused its discretion. *See United States v. Any and All Radio Station Transmission Equipment*, 204 F.3d 658, 665 (6th Cir. 2000) ("Strawcutter"); *Waste Mgmt., Inc. of Tenn. v. Metro. Gov't of Nashville and Davidson County*, 130 F.3d 731, 735 (6th Cir. 1997). The district court abuses its discretion if it "applies the wrong legal standard, misapplies the correct legal standard, or relies on clearly erroneous findings of fact." *Waste Mgmt.*, 130 F.3d at 735; see also Strawcutter, 204 F.3d at 665. The district court's decision that it [*522] lacked the power to consider equitable defenses is reviewable de novo as a

question of law. *See Rock & Roll Hall of Fame and Museum, Inc. v. Gentile Productions*, 134 F.3d 749, 754 (6th Cir. 1998).

B

Szoka believes he is fighting a noble battle in favor of microradio broadcasting in general and his community of listeners in particular. That may be the case, but it is not for this court to pass judgment on. This case concerns the sole question of whether the district court acted properly in issuing an injunction to prevent Szoka from broadcasting without a license. Our analysis must begin and end with that question, even though Szoka wishes it to go further.

At its core, this is a simple case. An individual cannot broadcast without a license. 47 U.S.C. § 301.[3] The FCC has the power to issue a cease and desist order against an individual who broadcasts without a license. 47 U.S.C. §

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[3] In pertinent part, 47 U.S.C. § 301 states:

No person shall use or operate any apparatus for the transmission of energy or communications or signals by radio (a) from one place in any State, Territory, or possession of the United States or in the District of Columbia to another place in the same State, Territory, possession, or District ... except under and in accordance with this chapter and with a license in that behalf granted under the provisions of this chapter.

312(b).[4] Once the cease and desist order is entered, the individual must stop broadcasting. The individual is given the opportunity to appeal the cease and desist order, but the appeal must go to the United States Court of Appeals for the District of Columbia Circuit, which has exclusive jurisdiction over such matters. 47 U.S.C. § 402(b)(7).[5] If an individual does not obey a cease and desist order, the Act allows the FCC to seek enforcement in the appropriate federal district court. 47 U.S.C. § 401(b).[6] According to

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[4] In pertinent part, 47 U.S.C. § 312(b) states:

Where any person ... (2) has violated or failed to observe any of the provisions of this chapter ... the Commission may order such person to cease and desist from such action.

[5] In full, 47 U.S.C. § 402(b)(7) states:

Appeals may be taken from decisions and orders of the Commission to the United States Court of Appeals for the District of Columbia in any of the following cases:

(7) By any person upon whom an order to cease and desist has been served under section 312 of this title.

[6] In full, 47 U.S.C. § 401(b) states:

If any person fails or neglects to obey any order of the Commission other than for the payment of money, while the same is in effect, the Commission or any party injured thereby, or the United States, by its Attorney General, may apply to the appropriate district court of the United States for the enforcement of such order. If, after hearing,

(continued...)

§ 401(b), the district court is to conduct a hearing and enforce the FCC's order if the court determines that "the order was regularly made and duly served" and that "the person is in disobedience of the same."

Szoka was broadcasting without a license. The FCC issued a cease and desist order against him. Szoka has appealed the cease and desist order to the D.C. Circuit. In the meantime, Szoka did not obey the cease and desist order and continued to broadcast. The FCC sought injunctive [*523*] relief in federal district court. The district court determined that the "order was regularly made and duly served" and that Szoka disobeyed it. Therefore, the district court entered an injunction against Szoka. The district court acted properly. Szoka presents no credible evidence indicating that (1) he was not broadcasting without a license, (2) the cease and desist order was not regularly made and duly served, and (3) he was not disobeying the order. We agree with the district court's conclusion: "Szoka has no right to simply broadcast without a license." Therefore, we must affirm the district court's decision.

C

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[6](...continued)
that court determines that the order was regularly made and duly served, and that the person is in disobedience of the same, the court shall enforce obedience to such order by a writ of injunction or other proper process, mandatory or otherwise, to restrain such person or the officers, agents, or representatives of such person, from further disobedience of such order, or to enjoin upon it or them obedience to the same.

Szoka raises a number of arguments that add a few wrinkles to what otherwise seems a straightforward case. Szoka claims that the district court erred by (1) not properly considering traditional equitable factors for issuance of an injunction, (2) not considering Szoka's constitutional arguments against the FCC's ban on microradio broadcasters, and (3) not staying enforcement of the FCC's cease and desist order until completion of Szoka's appeal of the cease and desist order to the D.C. Circuit and the FCC's ongoing administrative rulemaking process regarding low-power FM radio. We will address each of these arguments in turn.

1

Szoka contends that the district court erred in determining that it need not consider traditional equitable factors when entering injunctive relief in favor of the government. In most cases, a district court must consider four factors when determining whether to issue a preliminary injunction: (1) whether the movant has a strong likelihood of success on the merits; (2) whether the movant would suffer irreparable injury without the injunction; (3) whether issuance of the injunction would cause substantial harm to others; and (4) whether the public interest would be served by issuance of the injunction. *See Blue Cross & Blue Shield Mutual of Ohio v. Blue Cross and Blue Shield Ass'n*, 110 F.3d 318, 322 (6th Cir. 1997). In most cases in which a district court considers whether to issue a permanent injunction, the court must also consider whether the plaintiff has demonstrated (1) a continuing irreparable injury if the court fails to issue the injunction, and (2) the lack of an adequate remedy at law. *See Kallstrom v. City of Columbus*, 136 F.3d 1055, 1067 (6th Cir. 1998). The district court in this case determined that it was not re-

quired to consider these equitable factors, because Congress provided by statute the bases for the injunctive relief sought by the government. The court briefly stated that if it were required to consider traditional equitable factors, it still would be compelled to issue the injunction in favor of the government.

The district court did not err. According to 47 U.S.C. § 401(b), the government needed only to meet the statutory requirements for the issuance of an injunction enforcing the cease and desist order. In this sense, Congress has replaced the traditional equitable factors with a different inquiry. *See CSX Transp., Inc. v. Tennessee State Bd. of Equalization*, 964 F.2d 548, 551 (6th Cir. 1992) (holding that where Congress expressly authorized granting of injunctive relief to halt discriminatory state taxation of railroads by showing of "reasonable cause" of a statutory violation, traditional equitable criteria do not govern the issuance of a preliminary injunction); *Illinois Bell Tel. Co. v. Illinois Commerce Comm'n*, 740 F.2d 566, 571 (7th Cir. 1984) (court need not address traditional equitable factors such as irreparable harm when reviewing motion for injunction under [*524] § 401(b), since court "only need find that 'the order was regularly made and duly served'" and that defendant "is in disobedience of the same"). It was not necessary for the district court, nor is it necessary for this court to consider traditional equitable factors.

Szoka relies on a number of inapposite cases in claiming that the district court was required to consider traditional equitable factors. The primary case upon which Szoka relies, *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 72 L. Ed. 2d 91, 102 S. Ct. 1798 (1982), concerned an action brought pursuant to the Federal Water Pollution

Control Act (FWPCA) seeking to enjoin the United States Navy from discharging ordnance into the waters surrounding Vieques Island in Puerto Rico without first obtaining a permit from the Environmental Protection Agency. The Supreme Court reversed the First Circuit's decision mandating that the Navy cease the discharges until it obtained a permit. The lower court ruled that the Navy had a statutory obligation to stop the discharges until the permit procedures had been followed. *Id.* at 311. The Supreme Court held that the appellate court erred by not considering traditional equitable factors. *Id.* at 320. In Weinberger, the Court specifically noted that Congress did not foreclose the exercise of equitable discretion in enacting the FWPCA. *Ibid.* The court indicated that Congress did not require a district court to issue an injunction for "any and all statutory violations" under the FWPCA but only when the court considers the relief "necessary to secure prompt compliance with the Act." *Ibid.*

That is simply not the case here. Szoka is unable to point this court to any portion of the Communications Act indicating that Congress intended to give courts the ability to exercise discretion in considering whether to issue injunctions pursuant to 47 U.S.C. § 401(b). The language of the statute indicates that Congress intended that the district court issue injunctive relief in favor of the government for any violations of the Communications Act in which a broadcaster continues to disobey a regularly made and duly served cease and desist order. By stating in 47 U.S.C. § 401(b) that if a district court "determines that the order was regularly made and duly served, and that the person is in disobedience of the same, the court shall enforce obedience to such order by a writ of injunction," Congress used language that effectively limits the discretion of the district court.

The limited discretion given to a district court reviewing the government's motion for an injunction against a broadcaster that disobeys a cease and desist order is balanced by the broader discretion given to the District of Columbia Circuit in reviewing a request by the broadcaster for temporary relief from the cease and desist order. Upon the release of a cease and desist order, the aggrieved party may appeal to the District of Columbia Circuit, as Szoka did in this case. According to 47 U.S.C. § 402(c), "upon filing of such notice, the [District of Columbia Circuit] shall have jurisdiction of the proceedings and of the questions determined therein and shall have power, by order, directed to the Commission or any other party to the appeal, to grant such temporary relief as it may deem just and proper." This statutory language gives the D.C. Circuit power to issue a stay of the cease and desist order and presumably gives the D.C. Circuit the ability to consider equitable factors, given the statute's language that the court may grant relief that it "deems just [*525] and proper." *Ibid.*[7]

Under the scheme envisioned by the Act, the district court's powers and the D.C. Circuit's powers are comple-

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[7] In his Notice of Appeal and Petition for Review to the D.C. Circuit, Szoka raised the issue "whether the cease and desist order should be stayed until the Commissioner grants Grid Radio a license, either by waiving existing rules or as part of a new low-power FM service ...." Szoka asserted this issue as one of his bases for appeal, not as a request for temporary relief from the D.C. Circuit pursuant to 47 U.S.C. § 402(c). There is no indication that Szoka formally requested the D.C. Circuit to stay the cease and desist order pending his appeal.

mentary rather than contradictory. While the district court reviewing the government's motion for an injunction to enforce the cease and desist order must enter the injunction so long as the cease and desist order was regularly made and duly served and the broadcaster continues to disobey it, the D.C. Circuit has the ability to give the broadcaster temporary relief from the cease and desist order (and presumably any injunction issued by a district court enforcing a cease and desist order) while the broadcaster's appeal is pending.

Szoka also contends that even if the district court could only consider if "the order was regularly made and duly served" and "the person is in disobedience of the same," the district court erred in doing so. Szoka relies on *CSX* to support his argument. In *CSX*, the congressionally mandated standard was "reasonable cause to believe" a statutory violation was occurring. This court observed that the standard "certainly cannot be met ... by simply showing the possibility of a [statutory] violation." 964 F.2d at 555. Instead, the court held that "the district court must make a preliminary determination, based on the evidence that has been submitted by the plaintiff and the responses made at that point, whether there is reasonable cause to believe that the Act has been violated." *Ibid.* Similarly, Szoka argues that the FCC cannot obtain an injunction simply by showing the possibility that Szoka violated the Communications Act.

This argument lacks credibility. The test in CSX was a different, looser one than in this case and required a somewhat more substantial showing from the party attempting to obtain the injunction. In this case, the FCC needed only to show that "the order was regularly made and duly served" and that "the person is in disobedience of the

same." The FCC did so by demonstrating that the cease and desist order was validly entered and served and that Szoka continued to broadcast in the face of it. By making this showing, the FCC properly obtained an injunction pursuant to 47 U.S.C. § 401(b), which states that once this showing is made, "the court shall enforce obedience to such order by a writ of injunction."

2

Szoka also claims that the district court erred when it refused to consider Szoka's constitutional defenses to the government's motion for an injunction. Szoka argued to the district court and continues to argue on appeal that the FCC's former ban on microradio broadcasters is unconstitutional because it violates the First Amendment. As a result, he claims that the FCC cannot seek an injunction enforcing its cease and desist order.

a

We note as an initial matter that Szoka's constitutional arguments against the FCC's actions are limited to his challenge of the FCC's former ban on microradio broadcasters. Szoka does not contend [*526] that he has a constitutional right to broadcast without a license. In this case, Szoka did not apply for a license and fail because he was a microradio broadcaster or for some other reason. Nor did he seek review of the FCC regulations. Instead, he simply started broadcasting without a license as a form of civil disobedience against regulations he found objectionable. The FCC took action against Szoka not because he was broadcasting as a microradio station or because he objected to the FCC regulations, but because he was broadcasting without a license. There is no constitutional barri-

er to the FCC's ability to take action to enforce its licensing procedures.

The Supreme Court and this court have repeatedly held that there is no constitutional right to broadcast without a license. This principle dates back to the landmark Supreme Court decision *National Broadcasting Company v. United States*, 319 U.S. 190, 87 L. Ed. 1344, 63 S. Ct. 997 (1943). In *National Broadcasting*, the Supreme Court upheld the constitutionality of the Communications Act and its licensing procedures as valid exercises of congressional power and held that "the right of free speech does not include, however, the right to use the facilities of radio without a license." *Id.* at 227. These holdings were reaffirmed in *Red Lion Broadcasting Company v. FCC*, 395 U.S. 367, 23 L. Ed. 2d 371, 89 S. Ct. 1794 (1969). In *Red Lion*, the Supreme Court stated that the Communications Act was necessary to prevent a "cacophony of competing voices, none of which could be clearly and predictably heard." *Id.* at 376. The Court declared that there was no constitutional right to broadcast on the airwaves, stating "where there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish." *Id.* at 388.

In recent cases considering constitutional challenges raised in forfeiture proceedings instituted by the FCC against microradio broadcasters, this court noted these longstanding principles. *See United States v. Any and All Radio Station Transmission Equipment*, 218 F.3d 543, 549-50 (6th Cir. 2000) (stating that broadcaster "does not have a First Amendment right to broadcast his views on an unlicensed radio station"); *Strawcutter*, 204 F.3d at 666

(noting that there is no constitutional right to broadcast without a license and that "nobody has a First Amendment right to hear radio broadcasts from a station that does not have a First Amendment right to broadcast them").

b

Even though Szoka concedes that he has no constitutional right to broadcast without a license, he challenges the FCC's actions against him on the basis that the FCC's former ban on microradio broadcasters constituted a violation of the First Amendment. In effect, Szoka argues that the FCC's ban on microradio broadcasters made it futile for him to even attempt to obtain a license. The district court properly concluded that Szoka was unable to use his constitutional arguments as a defense against the FCC's motion for an injunction.

This case is the next step in a logical progression of caselaw developed by this court in recent years regarding the ability of low-power radio broadcasters to raise constitutional arguments as a defense against FCC enforcement actions. In *Strawcutter*, 204 F.3d at 668, this court held that a district court can consider an unlicensed microradio broadcaster's constitutional [*527] defenses to an in rem forfeiture action instituted by the FCC pursuant to 47 U.S.C. § 510(a).[8] Szoka contends that Strawcutter applies

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[8] In full, 47 U.S.C. § 510(a) states:

Any electronic, electromagnetic, radio frequency, or similar device, or component thereof, used, sent, carried, manufactured, assembled, possessed, offered for sale, sold, or advertised with willful and knowing intent to

(continued...)

equally to his case, which involves a different form of enforcement: a motion for an injunction seeking to enforce an administrative order. We are not persuaded. We believe that there are fundamental differences between the government undertaking a civil forfeiture action against an unlicensed broadcaster, as in Strawcutter, and the government securing a cease and desist order against an unlicensed broadcaster and then seeking injunctive relief from the district court to enforce that action, as in this case.

This court recently discussed this distinction in *La Voz Radio de la Communidad v. FCC*, 223 F.3d 313 (6th Cir. 2000). In *La Voz*, a microbroadcaster engaged in a preemptive strike against the FCC by seeking an injunction to prevent the FCC from taking any action to stop the microbroadcaster from broadcasting without a license. This court affirmed the district court's dismissal of the action for lack of subject matter jurisdiction. The plaintiff relied on a constitutional claim under the Religious Freedom Restoration Act as a basis for district court jurisdiction. *Id.* at 319. This court rejected the argument, ruling that the broadcaster could not raise a constitutional claim "as part of a preemptive action designed to stop the FCC from availing itself of its statutory remedies against unlicensed microbroadcasters." *Id.* at 320. The court noted that although the broadcaster could not raise its constitutional arguments as part of a preemptive attack against the FCC's regulations, it could raise them as part of "the method prescribed by Congress for the review of FCC actions." *Ibid.*

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[8](...continued)
violate section 301 or 302a of this title, or rules prescribed by the Commission under such sections, may be seized and forfeited to the United States.

The La Voz court stated that in Strawcutter, "this court held that when the FCC does not proceed administratively against an unlicensed microbroadcaster, but instead initiates an in rem action in the district court seeking the forfeiture of offending broadcasting equipment, the microbroadcaster is not precluded from challenging the legal basis of the government's forfeiture case in the district court." *Id.* at 319. The La Voz court emphasized the different circumstances that exist when a cease and desist order is issued against and challenged by a microbroadcaster. The court stated that, "of critical importance in Strawcutter was the fact that no FCC order was being challenged," and that review of cease and desist orders "is committed to the District of Columbia Circuit." *Id.* at 320; *see also Rippe v. FCC*, 528 F.2d 771, 772 (6th Cir. 1976). The court stated that under Strawcutter, "a microbroadcaster may raise constitutional arguments as a shield to defend itself in a forfeiture action brought by the government when the forfeiture action was not preceded by any formal administrative action." *Ibid.*

While the circumstances of this case differ from those of La Voz, the controlling legal principles do not. La Voz emphasized that when challenging the constitutionality of the FCC's regulations against microbroadcasters, certain rules must be followed. When the FCC institutes an in rem forfeiture action--and not an administrative action--against a microbroadcaster, the broadcaster can raise and the district court can consider constitutional [*528] defenses. However, if the FCC institutes administrative proceedings, such as the issuance of a cease and desist order, against a microbroadcaster, the microbroadcaster must pursue his constitutional claims through the means given by Congress, which is the administrative process undertaken by

the FCC and its review in the D.C. Circuit. Just as the plaintiff in La Voz could not use a constitutional claim as a sword to launch a preemptive strike against the FCC, so too is Szoka unable to use his constitutional claim as a shield in defense against the FCC's motion for an injunction enforcing the cease and desist order. That does not mean that Szoka's shield is taken away from him. It just means that he can use it only during the FCC's administrative proceedings against him and in his appeal of the results of those proceedings in the District of Columbia Circuit.

This result allows Szoka to raise his constitutional defenses within the scheme contemplated by the Communications Act. In Strawcutter, no FCC order was issued against the unlicensed microbroadcaster. Instead, the FCC went directly to the district court and instituted an in rem forfeiture action against the broadcaster. The broadcaster had no other forum in which to present his constitutional defenses. In this case, however, an FCC order was issued against Szoka, mandating that he cease and desist from broadcasting without a license. Szoka had the opportunity to raise his constitutional defenses in the course of the administrative action undertaken by the FCC. The FCC considered all of Szoka's constitutional defenses and rejected them. *See* In re Jerry Szoka, Cleveland, Ohio, 14 FCC Rcd 9857, FCC No. 99-145, 1999 WL 386918, at paras. 16-19 (June 15, 1999). Szoka can raise his constitutional defenses once more in his appeal of the cease and desist order to the D.C. Circuit. There was no need for the district court to address Szoka's constitutional arguments, because he was able to raise them in other proceedings.

Moreover, allowing both the court reviewing the FCC's

cease and desist order and the court considering whether to grant an injunction enforcing the cease and desist order to address a broadcaster's constitutional arguments could create contradictory holdings within the same case. The district court properly concluded that its proceedings were limited solely to the question of whether an injunction should issue against Szoka. In other words, it had no jurisdiction to set aside or suspend the FCC's cease and desist order, since review of the cease and desist order is reserved for the D.C. Circuit.

If the district court were to have considered Szoka's constitutional arguments, it could have concluded that the FCC's ban on microradio broadcasters was unconstitutional. This finding could have effectively nullified the cease and desist order. At the same time, the D.C. Circuit could have affirmed the cease and desist order, which held that the FCC's ban on microradio broadcasters was constitutional. Such a contradictory result is one that we wish to avoid. It is also a result that the Communications Act was designed to avoid, since the Act gives exclusive jurisdiction for review of FCC cease and desist orders to the D.C. Circuit. Only the D.C. Circuit can nullify a cease and desist order based on unconstitutional regulations promulgated by the FCC. Therefore, Szoka cannot raise his constitutional arguments as a defense against the government's motion for an injunction enforcing the cease and desist order. He can address his constitutional arguments only to the D.C. Circuit during [*529] its review of the cease and desist order.[9]

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[9] Unlike the district court, we refuse to speculate on the constitutionality of the FCC regulations prohibiting the licensing of microradio stations that were in effect when Szoka began broadcasting Grid Radio.

Other circuit courts have addressed whether an unlicensed broadcaster can raise constitutional defenses against the FCC's motion for an injunction, but in each of those cases the FCC was not seeking the injunction to enforce a cease and desist order under 47 U.S.C. § 401(b), but rather, relying on general enforcement powers under 47 U.S.C. § 401(a).[10]

In *United States v. Neset*, 235 F.3d 415 (8th Cir. 2000), the court applied the Eighth Circuit's previous holding in *United States v. Any and All Radio Station Transmission Equipment ("Fried")*, 207 F.3d 458 (8th Cir. 2000). In *Fried*, a panel of the Eighth Circuit, upon rehearing, reversed its previous holding, and concluded that an unlicensed microbroadcaster could not raise constitutional defenses against a civil forfeiture action undertaken by the FCC.[11] The *Fried* court relied on statutory language indicating that the courts of appeals have exclusive jurisdiction to review all final orders of the FCC, including orders deciding applications for broadcast licenses and requests for waivers. 207 F.3d at 462-63. Specifically, the court relied on 47 U.S.C. § 402(a), which states that "any pro-

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[10] In full, 47 U.S.C. § 401(a) states:

The district courts of the United States shall have jurisdiction, upon application of the Attorney General of the United States at the request of the Commission, alleging a failure to comply with or a violation of any of the provisions of this chapter by any person, to issue a writ or writs of mandamus commanding such person to comply with the provisions of this chapter.

[11] This decision runs contrary to this court's decision in *Strawcutter*.

ceeding to enjoin, set aside, annul, or suspend any order of the Commission ... shall be brought as provided by and in the manner prescribed in chapter 158 of Title 28." The statute that § 402(a) cross-references states: "The court of appeals ... has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of--(1) all final orders of the Federal Communications Commission made reviewable by section 402(a) of title 47." 28 U.S.C. § 2342. The *Fried* court stated that the microbroadcaster could have "obtained review by applying for a license and asking for a waiver of the regulations; rejection of his request would have permitted appeal to the circuit. Rather than follow the procedures established by law, he has attempted an end run blocked by the statutory channels provided for constitutional claims." 207 F.3d at 463. The court in *Neset* concluded that *Fried*'s "rationale applies as well to actions seeking injunctive relief under 47 U.S.C. § 401(a)." 235 F.3d at 421.[12]

In *United States v. Dunifer*, 219 F.3d 1004, 1006-07 (9th Cir. 2000), the Ninth Circuit explicitly followed *Fried*. The court acknowledged that the broadcaster was not challenging an FCC order, but relied on previous circuit precedent indicating that "challenging FCC regulations is equivalent to an action to enjoin, annul, or set aside an order of the FCC." *Id.* at 1007 (citing *Sable Communications of Cal., Inc. v. FCC*, 827 F.2d 640, 642 (9th Cir. 1987)). As a result, the court concluded that the district court lacked jurisdiction over the broadcaster's

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[12] A member of the panel in *Neset* dissented, agreeing with this court's decision in *Strawcutter* and extending it to the district court's review of the FCC's motion for an injunction. *Neset*, 235 F.3d at 421 (Heaney, J., dissenting).

constitutional [*530] arguments on the basis of 47 U.S-.C. § 402(a) and 28 U.S.C. § 2342.

In *Prayze FM v. FCC*, 214 F.3d 245, 251-53 (2d Cir. 2000), the Second Circuit held that although a microbroadcaster lacked standing to bring an as-applied challenge to the FCC low-power radio regulations since the broadcaster had not applied for a license, the broadcaster could bring a facial challenge to the regulations.

Our reasoning differs from that of other circuit courts that have addressed whether an unlicensed microbroadcaster can raise constitutional defenses against the government's motion for an injunction. The difference is based on the fact that in this case the FCC is seeking an injunction to enforce a cease and desist order, rather than acting pursuant to its general enforcement powers under 47 U.S-.C. § 401(a). We base our decision on the statutory language of the Communications Act, 47 U.S.C. § 402(b)(7), which directs that appeals of cease and desist orders be made to the D.C. Circuit, and 47 U.S.C. § 401(b), which allows the FCC to seek an injunction enforcing its cease and desist in district court. Reading these statutory provisions together, we do not believe that, when determining whether to issue an injunction, the district court can consider the constitutional arguments of an individual against whom an FCC cease and desist order has been issued.[13]

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[13] Our holding is not meant to cast any doubt on this court's prior holding in Strawcutter. We have discussed in detail the difference between the circumstances of this case, in which a broadcaster cannot raise constitutional arguments in defense against the government's motion for an injunction enforcing a cease and desist order and those

(continued...)

Our holding is limited to the circumstances of this case. We reserve for another day the question faced by the courts in Fried, Dunifer, and Prayze FM: whether a broadcaster can raise constitutional arguments to the district court in defense against the government's motion for an injunction when an FCC cease and desist order has not previously been issued.

3

Szoka also argues that the district court was required to await the resolution of his appeal to the D.C. Circuit before ruling on the FCC's motion for an injunction. There is no basis in law for this argument. Cease and desist orders from the FCC are effective on the date of their release, which in this case was June 15, 1999, five days after the FCC adopted its decision affirming the ALJ's cease and desist order. *See* 47 C.F.R. §§ 1.103(a), 1.4(b)(2). At that point, the aggrieved party is directed to the D.C. Circuit to appeal the order pursuant to 47 U.S.C. § 402(b)(7), and the FCC is directed to the district court to seek enforcement pursuant to 47 U.S.C. § 401(b). Szoka is unable to point to any provision of the Act that states that a cease and desist order is not effective upon its release or that a district court is prevented from enforcing such an order until appellate proceedings in the D.C. Circuit are concluded. This is unsurprising because the existence of such a provision would prevent the FCC from enforcing its regulations and would enable a broadcaster against whom an order was entered to delay the enforce-

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[13](...continued)
of Strawcutter, in which a broadcaster can raise constitutional arguments in defense against a civil in rem forfeiture action undertaken by the FCC.

ment of the order by dragging out the appeals process. Moreover, pursuant to 47 U.S.C. § 402(c), Szoka had the opportunity to file a motion to expedite his appeal in the D.C. Circuit or a motion to stay the effectiveness of the cease and desist order pending appeal but there is no indication that Szoka did so. *See* supra note 7.

In addition, Szoka contends that the district court should have awaited the [*531] resolution of the FCC's low-power FM radio administrative rulemaking proceedings. This argument is also unfounded. The FCC took action against Szoka because he was broadcasting without a license, not because he was operating what was, in effect, a low-power FM radio station. There is no basis for staying the current proceedings against Szoka pending the completion of the FCC's administrative rulemaking process.

III

For the foregoing reasons, the judgment of the district court is AFFIRMED.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

FILED
00 FEB. 23

UNITED STATES of AMERICA,	:	**Case No. 1:99CV2008**
Plaintiff,	:	**JUDGE O'MALLEY**
v.	:	**MEMORANDUM & ORDER**
JERRY SZOKA,	:	
Defendant.	:	

Plaintiff, the United States of America ["the United States"], on behalf of the Federal Communications Commissions ["FCC"], seeks declaratory and injunctive relief against defendant, Jerry Szoka, for his refusal to comply with an FCC Cease and Desist Order requiring Szoka to stop broadcasting without an FCC license. The FCC issued the Cease and Desist Order because Szoka was broadcasting Grid Radio on 96.9 FM without a license in violation of 47 U.S.C. §301, which requires all radio broadcasts to be licensed by the FCC. The United States brings this cause of action pursuant to 47 U.S.C. §401(b) of the Communications Act of 1934, which authorizes a U.S. District Court to enjoin a defendant from violating an FCC Cease and Desist Order. For the reasons stated below, plaintiff's motion for a preliminary and permanent injunction is GRANTED.

[PAGE 2]

1. BACKGROUND

A.

In September of 1995, Jerry Szoka began broadcasting Grid Radio, 96.9 FM, from the Grid Nightclub, a nightclub he partially owns. Szoka previously volunteered at a college radio station, gaining technical knowledge of radio broadcasting, and also developing a format for his own college radio show. In his college show, Szoka played dance music in what he characterizes as a Gay/Lesbian/Bisexual/Transsexual[1] friendly atmosphere. After Szoka left college radio he wanted to expand upon the radio format he had developed and, thus, decided to start his own radio station, Grid Radio. He began broadcasting at approximately 50 watts, a very low-strength signal, because a higher strength signal required prohibitively expensive equipment.

Szoka knew that, in order to legally broadcast Grid Radio, he first needed to obtain a license from the Federal Communications Commission ["FCC"]. He called the FCC to inquire about a license, but the FCC informed him that it would not license low-powered radio stations that broadcast at 100 watts or less.[2] Because he did not have

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[1]The Court will use the shorthand of "gay," even though it realizes it is technically incorrect, to encompass all of these terms.

[2]The Communications Act gives the FCC statutory authority to issue regulations that it deems necessary to prevent interference between stations and to carry out the provisions of the Communications Act. 47 U.S.C. §§302(a),

(continued...)

the financial ability to broadcast

[PAGE 3]

at over 100 watts and believing the FCC was violating his First Amendment rights by refusing to license low-power radio, Szoka began broadcasting Grid Radio without a license. The FCC did not inform Szoka that he could seek a waiver of the FCC regulations at the time he asked about a license. Szoka later learned, however, that a waiver procedure existed, though he also learned that requests for

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[2](...continued)
302(b). Under these regulations, the FCC grants FM broadcast licenses under four separate classifications, classes A, B, C, and D. See 47 C.F.R. §73.210 et. seq. Class assignments depend upon factors such as transmission power, antenna height, and the area or place from which the broadcast is emanating. Id. Originally, class D licenses were allocated to stations that operated at a power level of less than 100 watts and retained an approximate reception area of between two to twelve miles radius from the point of transmission. In 1978, however, the FCC forbade the issuance of all future Class D licenses. See 47 C.F.R. §73.211(a) (FM stations must operate with a minimum effective radiated power of 100 watts); §73.511(a) (no new noncommercial educational FM stations will be licensed with less than the minimum power of 100 watts); §73.511(c) ("Except in Alaska, no new Class D applications nor major change applications by existing Class D stations are acceptable for filing except by existing Class D stations seeking to change frequencies"). This prohibition on the issuance of new Class D licenses effectively banned any new radio station from broadcasting at less than 100 watts.

a waiver have essentially never been authorized to persons in his circumstances and that the FCC had ceased accepting waiver applications pending consideration of possible changes to the rules governing low-powered stations.[3] For these reasons, Szoka has not sought a waiver from the FCC regulations.

Szoka broadcasts Grid Radio on 96.9 FM, an empty frequency in the Cleveland area, so that Grid Radio would not interfere with other broadcasts. The FCC has received no complaints that Grid Radio interferes with other broadcasts, including broadcasts on emergency and air traffic control frequencies, and made no effort in this proceeding to establish that it does. Szoka testified at trial that he is and has been very conscientious about interference with other frequencies and has strived to make broadcasts that, other than being unlicensed, comply with all FCC regulations.

Grid Radio broadcasts from 4:00 p.m. to 3:00 a.m. Mondays through Fridays, and

[PAGE 4]

1:00 p.m. to 3:00 a.m. on Saturdays and Sundays. For the most part, Grid Radio plays dance music in a club format. Grid Radio also broadcasts public service announcements for non-profit organizations, and provides informational

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[3]The FCC has only waived its regulations prohibiting the licensing of low-powered radio stations twice since it has banned micro-broadcasting; once for an Indian village on an isolated island in Alaska, and once for a Navajo community in a remote area of New Mexico. See Turro v. FCC, 859 F.2d 1498, 1500 (D.C. Cir. 1988).

programming for the gay community. For example, Grid Radio has a program every Sunday afternoon called the "Beat Boys" where guests discuss issues relevant to the gay community. Past programs have included discussions about AIDS treatments, safe sex, and bath houses. Programming is targeted to a gay audience and issues are discussed in a way that is relevant and respectful to the gay community.

B.

In broadcasting without an FCC license, Szoka is part of a recently successful movement of low-power broadcasters, called radio "pirates" or -- their preferred term -- "micro-broadcasters," who have defied the FCC's licensing prohibition on low-wattage radio broadcasting. See Fatima Fofana, Comment, *Creating a Diversity of Voices: Local Expression through a Low Power Radio Service*, 7 COMM. LAW CONSPECTUS 409 (1999). These micro-broadcasters wished to open the airwaves to more diverse and more local, community-oriented radio programming, and felt that the FCC's regulations prohibiting the licensing of new low-wattage radio stations were squelching these goals, Id. This movement gained momentum after the Telecommunications Act of 1996 was passed, which relaxed certain restraints on the number of broadcast stations any one party may own, both locally and nationally. See Pub. L. No. 104-104, 110 Star. 56 (codified at 47 U.S.C. § 151 (1994 & Supp. 1997). Lifting these restraints caused large-scale consolidation among radio owners. See Fofana, *supra*, at 409, 410. For example, in Cleveland, only one radio station is locally owned; the rest are essentially divided

between two national corporations. See Tr. T. at 105.

The loss of diversity caused by these mass consolidations, and the extreme interest shown by radio "pirates" in micro-broadcasting, has caused the FCC to reevaluate its rules regarding low power broadcasts. See In Re Creation of Low Power Radio Service, Notice of Proposed Rule Making (Feb. 3, 1999). Szoka, and many other micro-broadcasters, submitted comments on these proposed rules and actively pursued their implementation. See Szoka Tr. T at 45.

The FCC has just passed new regulations which authorize the licensing of micro-broadcasters. See FCC, Report and Order, 99-25 (January 27, 2000). These regulations authorize licenses for two new classes of FM radio stations - - one operating at a maximum power of 100 watts and one at a maximum power of 10 watts. Id. Szoka, though, will not benefit from these new regulations. The FCC instituted the current proceedings against Szoka before these new regulations were passed; the fact that Szoka may have been able to receive a license under these regulations if they had been in place previously does not change the fact that he is currently broadcasting without a license and has been doing so for some time. It appears, moreover, that Szoka will never be able to obtain a micro-broadcasting license, despite these new regulations, as the FCC will not license broadcasters who have defied its licensing regulations in the past.[4]

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[4]The FCC will only accept applicants who certify, "under penalty of perjury, that: (l) it voluntarily ceased engaging in the unlicensed operation of any station no later than February 26, 1999, without specific direction to terminate

(continued...)

In November of 1996, the FCC learned that Grid Radio was broadcasting without a license. James A. Bridgewater, District Director of the Detroit, Michigan Field Office of the Compliance and Information Bureau of the FCC, sent two letters to Szoka, dated February 20, 1997 and June 11, 1997. notifying Szoka that operating a radio station without a license violated federal law and could subject him to penalties, including fine and imprisonment, and warning Szoka to stop the illegal broadcasts. Szoka admits that he received these letters. Szoka did not cease broadcasting.

On March 19, 1998, the FCC confirmed that Szoka continued to broadcast Grid Radio on 96.9 FM. On April 6, 1998, the FCC issued to Szoka an order to show cause why he should not be ordered to cease operating Grid Radio in violation of 47 U.S.C. §301. The order further called for a determination, pursuant to 47 U.S.C. §503(b), of whether an order of monetary forfeiture in an amount not to exceed $11,000 should issue against Szoka for transmitting signals without a license. The order also gave

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[4](...continued)
by the FCC; or (2) it ceased engaging in the unlicensed operation of any facility within 24 hours of being advised by the Commission to do so." See FCC, Report and Order, 99-25 at 21 (January 27, 2000). While this position seems somewhat vindictive, especially since it was at least partially in response to the tenacity of pirates like Szoka that the FCC was prompted to reconsider its position on micro-broadcasters, neither the wisdom of, nor the applicability of this prohibition to Szoka, is presently before the Court.

Szoka notice of an opportunity for a hearing.

On September 4, 1998, Chief Administrative Law Judge Joseph Chacklin, in a summary opinion, ordered Szoka to cease and desist from operating an unlicensed broadcast station and imposed a monetary forfeiture of $11,000. On June 15, 1999, the FCC released an Order, pursuant to 47 U.S.C. §312(b), that required Szoka to cease and desist from making unauthorized radio transmissions and ordered Szoka to forfeit $11,000 to the United States for willfully broadcasting Grid Radio without a license. This Order was accompanied by a

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Memorandum explaining why the FCC did not believe that Szoka's defenses, constitutional and otherwise, were applicable to the matters before it. Szoka received a copy of this Order and Memorandum on June 24, 1999. Szoka petitioned the FCC for reconsideration of the Order.

On October 19, 1999, the FCC denied Szoka's motion for reconsideration. Szoka then appealed the FCC Order to the United States Court of Appeals for the District of Columbia. That appeal is still pending.

On August 20, 1999, before the FCC ruled on Szoka's motion for reconsideration, the United States came to this Court to ask for a declaration that the order of the FCC was "regularly made and duly served," and to seek a preliminary and permanent injunction stopping Szoka from violating the FCC order. The Court held a Case Management Conference on September 30, 1999 and, by parties' request, set this case on an expedited track. The parties agreed that the trial on the merits should bc combined with the preliminary injunction hearing, and the Court, thus, set

a single date for the consideration of both. After the completion of discovery, the Court held the combined preliminary injunction hearing and trial on the merits on December 2, 1999.

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II. LAW AND ARGUMENT

The United States brings this action on behalf of the FCC, under 47 U.S.C. §401(b), which allows the FCC to seek an injunction from a United Stated District Court to enforce an FCC Cease and Desist Order. The United States wants the Court to enjoin Szoka from broadcasting in violation of the FCC's order to cease broadcasting. §40 l(b) provides:

> If any person fails or neglects to obey any order of the Commission other than for the payment of money, while the same is in effect, the Commission or any party injured thereby, or the United States, by its Attorney General, may apply to the appropriate district court of the United States for the enforcement of such order. If, after hearing, that court determines that the order was regularly made and duly served, and that the person is in disobedience of the same, the court shall enforce obedience to such order by a writ or injunction or other proper process, mandatory or otherwise, to restrain such person or the officers, agents, or representatives of such person, from further disobedience of such order, or to enjoin upon it or them obedience to the same.

Under this statute, the Court is required to enjoin Szoka from disobeying the Cease and Desist Order, if the Court finds, after a hearing, that the FCC Order was regularly made, duly served, and that Szoka is disobeying the Order.

At the trial, Szoka did not argue that the Cease and Desist Order was not regularly made or duly served. Indeed, the administrative record evidences that there was nothing irregular about the issuance of the Cease and Desist Order. Szoka also readily announced at the trial that he is disobeying the FCC Order and will continue to do so in the future. See Tr. T. at p. 33. Szoka, instead, asserts that enforcement of 47 U.S.C. §401 is unconstitutional as applied to Grid Radio and that the harm to the community would bc so substantial that this Court should decline to enforce the FCC's Order, whether regularly made or not.

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A.

Normally when determining whether to issue a preliminary injunction, the Court considers four equitable factors, "(1) whether the movant has a strong likelihood of success on the merits; (2) whether the movant would suffer irreparable injury without the injunction; (3) whether the issuance of the injunction would cause substantial harm to others; and (4) whether the public interest would be served by issuance of the injunction." Rock & Roll Hall of Fame & Museum. Inc. v. Gentile Prods., 134 F.3d 749, 753 (6th Cir. 1998)). When determining whether to issue a permanent injunction the Court must further consider whether the plaintiff has shown, "1) a continuing irreparable injury if the court fails to issue the injunction, and 2) the lack of an adequate remedy at law." Kallstrom

v. City of Columbus, 136 F.3d 1055, 1067 (6th Cir. 1998); see also Beacon Theatres, Inc. v. Westover, 3 L. Ed. 2d 988, 995 (1959).

Since Congress provided for this injunction by statute, however, the Court need not consider these equitable factors. Simply fulfilling the requirements of the statute or, in other words, fulfilling the first factor for an injunction to issue -- showing success on the merits -- is all that is needed for the Court to issue an injunction. See U.S. v. Microsoft Corp., 147 F.3d 935, 943 (D.C. Cir. 1998) ("it is clear that if a statute confers a right to an injunction once a certain showing is made, no plaintiff, neither governmental agencies nor private parties -- need show more than the statute specifies"); Mical Communications Inc. v. Sprint Telemedia, 1 F.3d 1031, 1035 (10th Cir. 1993) ("When evidence shown shows that the defendants are engaged in, or about to be engaged in, the act or practices prohibited by a statute which provides for injunctive relief to prevent such violations, irreparable harm to the plaintiffs need not be shown"); CSX Transp. V. Board of Equalization, 964 F.2d 548, 551 (6th Cir. 1992) ("since

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Congress expressly authorized the granting of injunctive relief to halt or prevent a violation of the Railroad Revitalization and Regulatory Reform Act of 1976, traditional equitable criteria do not govern the issuance of preliminary injunctions"); U.S. v. Painesville, 646 F.2d 1186, 1194 (6th Cir. 1981) (holding that district court must, under a statutory injunction, order injunctive relief upon finding of liability without considering irreparable harm). Although a court may" not lightly assume" that the statutory specification displaces the traditional equitable standards, (Weinberger v. Romero-Barcelo, 456 U.S. 305, 312 (1982)),

and, before doing so, must determine that Congress intended "to intervene and guide or control the exercise of the courts's discretion," (id.), the statutory injunction contemplated in 47 U.S.C. §501(b) clearly displaces the traditional equity standards and curtails the court's discretion. See Illinois Bell Telephone Co. v. Illinois Commerce Comm'n, 740 F.2d 566, 571 (7th Cir. 1984) ("where a plaintiff seeks an injunction to prevent the violation of a statute that specifically provides for injunctive relief, it need not show irreparable harm .... This rule has been applied to private plaintiffs seeking an injunction under 47 U.S.C. §401(b)").

The United States argues that, since the FCC has shown, without disagreement from Szoka, the FCC Order was "regularly made and duly served," and Szoka is continuing to defy the Order, it has fulfilled the statutory injunction factors and has proven that it is successful on the merits. The United States urges the Court to enjoin Szoka on this ground alone. The government's argument has substantial force.

Despite the statutory basis for the United States' request for injunctive relief, Szoka still asks, however, that this Court use its inherent equitable powers to weigh the substantial injury the injunction will cause to him and his listeners, with the purportedly small injury his

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unlicensed broadcasting causes. See Weinberger v. Romero-Barcelo, 456 U.S. 305, 311 (1982)("In exercising their sound discretion, courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of an injunction"); Township of Huron v. FAA, 997 F.2d 1168, 1175 (6th Cir. 1993) ("The

issuance of an injunction is within the court's equitable discretion. Before resorting to this extraordinary remedy, a court must balance the interests of the parties giving particular attention to the public consequences of a decree"). In this regard, Szoka points out that the United States did not attempt to show, nor could it credibly establish, that his broadcasts interfered with any other broadcast, licensed or otherwise. Szoka understates the importance of the FCC's regulatory function when he asks this Court to second-guess or interfere with it, however, and ignores the harm to that authority which would flow from his unchecked unilateral decision to flout it. If radio stations could broadcast without a license as long as they claim to serve some segment of the public not currently being served by other radio stations, the structure set up by Congress in the Communications Act of 1934 to stop a "cacophony of competing voices, none of which could be clearly and predictably heard" without some control, would be impotent. Red Lion Broadcasting v. Federal Communications Commission, 395 U.S. 367, 376 (1969). The diversity of all human musical tastes, artistic sentiments, and community interests would supply a reason for far more radio stations than the spectrum could accommodate, even under current technological standards. Szoka surely must understand the rationale behind the FCC's licensing authority -- it is because of licensing that he is currently able to find an area of the spectrum without substantial fear of interference by another broadcaster. The harm to the FCC here, and to the public, is not simply interference with actual broadcasts, but a weakening of the FCC's ability to guard against the

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potential for such interference at all broadcast levels. While the Court is aware of the strong listener support

Szoka's radio broadcasts have aroused, strong audience support alone cannot provide grounds for Szoka to violate FCC regulations and to ignore duly authorized orders from that governmental agency. Thus, even if the Court were required to consider the remaining equitable factors -- irreparable harm, the balancing of harm between the parties, and the public interest -- it would be compelled to find that these factors weigh in favor of the injunction the United States seeks.

B.

Szoka asserts that, regardless of where the application of traditional principles governing equitable relief take it, this Court still may not enter an order whose effect is to silence his broadcasts. While Szoka offers a number of reasons for this contention, the Court has distilled his arguments to three main claims. First, Szoka argues that this Court lacks subject matter jurisdiction to issue an injunction because (a) the FCC has not exhausted its administrative remedies, and (b) the FCC and, by extension, the Court of Appeals for the District of Columbia retain "primary jurisdiction" over this matter. Second, Szoka argues that it is a violation of the FCC's own mission to prohibit low-power radio, thereby rendering any acts designed to do so unenforceable, Third, Szoka argues that, for a variety of reasons, the FCC's regulations are unconstitutional under the First Amendment. None of these arguments is sufficient to allow Szoka to avoid enforcement of the Cease and Desist Order.

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1.

Szoka asserts two different arguments in support of

his proposition that this Court does not have subject matter jurisdiction to issue an injunction against him. First, Szoka argues that the FCC has failed to exhaust its administrative remedies before seeking this injunction in Federal District Court. Szoka contends that the FCC should await the outcome of Szoka's appeal of the FCC's denial of reconsideration of the FCC Cease and Desist Order and await completion of the FCC's rulemaking on whether it will allow low power FM radio, before seeking an injunction against him in district court under 47 U.S.C. §504(b). For this, Szoka relies on U.S.v. Dunifer, 977 F.Supp. 1235, 1238 (1998), in which the district court stayed a similar action against Paul Dunifer, an unlicensed micro-broadcaster, to allow the FCC to first decide whether prohibiting Class D broadcasting was constitutional. The FCC, however, has since definitively stated that it believes the ban on micro-broadcasting is constitutional. See In the Matter of Application for Review of Stephen Paul Dunifer, 11 F.C.C.R. 718 (1995); In Re Jerry Szoka, FCC 99-145, 98-48 (June 15, 1999). And, the FCC has now promulgated rules allowing micro-broadcasters to be licensed under standards it has defined. See FCC, Report and Order, 99-25 (January 27, 2000). Thus, even it" this Court were to conclude that it had the authority to enter a stay in the face of a regularly made FCC order, none of the reasons to stay articulated in the Dunifer case exist here. 47 U.S.C. §401(b), moreover, does not require that all appeals or other administrative avenues be exhausted before seeking a district court injunction. Accordingly, the Court will not stay this action for a purported failure to exhaust other available remedies.

Szoka also argues that this Court should stay the proceedings under the doctrine of

"primary jurisdiction.'" Primary jurisdiction is a doctrine which holds that "questions within the special competency of an administrative agency should be resolved by that agency." Alltel Tennessee, Inc, v. Tennessee Public Service Commission, 913 F.2d 305, 309 (6th Cir. 1990). See also In re Long Distance Telecommunications Litigation, 831 F.2d 627, 631 (6th Cir. 1987). The reasoning behind this doctrine is "'to obtain the benefit of the expertise and experience of the administrative agencies and the desirable uniformity which occurs when a specialized agency decides certain administrative questions." Id. (quoting United States v. Western Pacific, 352 U.S. 59, 64 (1956) (Harlan, J.)). "A Court must apply the doctrine of primary jurisdiction on a case-by-case basis, deferring to an administrative agency only when the masons for existence of the doctrine are present." Id. The Court, thus, should only apply the doctrine of primary jurisdiction when there is a need for specialized agency review and should only do so where the matter is still within the purview of that administrative agency.

On its face, it would appear that the doctrine of primary jurisdiction cannot be applied here because no administrative proceedings are left to which this Court could defer.[5] The FCC has already issued its opinion that

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[5]The case that Szoka relies on to argue that this Court should defer judgment on the basis of primary jurisdiction is inapposite. In U.S. v. Any and All Radio Station Transmission Equipment [Radio Free Lenawee], 19 F.Supp. 2d 738 (E.D. Mich. 1998), the United States was seeking forfeiture under 47 U.S.C. §510(a), without having ever issued an FCC Cease and Desist Order. Here, the FCC evaluated Szoka's case and his constitutional and statutory

(continued...)

Szoka is violating its roles by broadcasting without a license and did so after considering each one of his affirmative defenses. See In Re Jerry Szoka, Cleveland, Ohio, FCC 99-145, 98-48 (June 15, 1999). The FCC has elucidated its position on the constitutionality of unlicensed micro-broadcasting, moreover, in several other opinions. See,

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e.g., In the Matter of Application for Review of Stephen Paul Dunifer, 11 F.C.C.R. 718 (1995). The only remaining litigation is in the Court of Appeals for the District of Columbia, which is not an administrative agency. While Szoka seeks to extend the concept of "primary jurisdiction" to cover court appeals from an administrative agency, Szoka cites no authority which supports that effort and the Court has found none.

Because it is inapplicable, accordingly, the Court declines to stay this case under the doctrine of primary jurisdiction. The Court now turns to Szoka's statutory and constitutional defenses.

2.

Szoka asserts that the FCC's regulations prohibiting the licensing of any new Class D stations violates the First Amendment to the United States Constitution. Szoka contends that the prohibition on licensing new Class D sta-

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[5](...continued)
defenses before issuing a Cease and Desist Order. The FCC, moreover, engaged in this analysis and issued the Cease and Desist Order before coming to Federal Court.

tions is an overbroad impermissible prior restraint on speech. This is so, Szoka claims, for two reasons: because the FCC is given standardless discretionary power to determine who receives a broadcasting license; and, because the ban on Class D licenses assures that only wealthier, less community-oriented stations, with the resources to afford the licensing fees and more expensive equipment, will be licensed. Szoka claims that, because of these "facts," the FCC's approach to micro-broadcasters is content-based censorship which cannot pass constitutional muster. Alternatively, Szoka contends that, even if the Class D ban is viewed as content-neutral, it does not pass constitutional muster because the restriction on First Amendment freedoms is greater than the governmental interest in providing a regulated broadcasting spectrum with little or no interference among stations.

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Szoka also asserts that the FCC's ban on new micro-broadcasters violates the FCC's statutory mandates, as reflected in the Communications Act of 1934, 47 U.S-.C. § 151 et seq., and its legislative history. The FCC is mandated to "study new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest." 47 U.S.C. §303(g). The FCC is also mandated to license broadcasting applicants in "fair, efficient, and equitable distribution." 47 U.S.C. §307(b). In all of its regulatory decisions, including determining who receives licenses and who does not, moreover, the FCC must take the "public interest" into consideration. See 47 U.S.C. §§ 303(a), 307(a) Szoka contends that, by only licensing radio stations who broadcast over 100 watts, the FCC is unfairly granting licenses only to stations who have resources and money, thereby only granting a forum in the

radio spectrum to the wealthy, and effectively silencing the voices of the country's more disenfranchised communities.

a.

The parties agree that, whatever the merits of Szoka's contentions, this Court has no jurisdiction to set aside the FCC Cease and Desist Order. The Federal Communications Act of 1934, 47 U.S.C. §§ 151 et. seq., grants exclusive jurisdiction to the federal Courts of Appeals to review FCC decisions. Section 402 states:

Any proceeding to enjoin, set aside, annul, or suspend any order of the FCC under this chapter (except those appealable under subsection (b) of this section) shall be brought as provided by and in the manner prescribed in chapter 158 of Title 28.

. . .

Appeals may be taken from decisions and orders of the... (FCC) to the United States Court of Appeals for the District of Columbia...[b]y any applicant for a... station license, whose application is denied by the Commission.

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47 U.S.C. §402(a),(b)(l). Chapter 158 provides that "[t]he court of appeals . . . has the exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of . . . all final orders of the [FCC] made reviewable by section 402(a) of title 47." 28 U.S.C. §2342. Szoka's only remaining forum for setting aside the Cease and Desist Order is, accordingly, the Court of Appeals for the District of Columbia, where his appeal from that Order remains pending.

At best, Szoka might convince this Court to withhold the injunction the FCC seeks on grounds that it would be inequitable to enforce an order born out of a patently illegal licensing system. See, e.g., Weinberger v. Romero-Barcelo, 456 U.S. 305, 312 ("The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular ease"). The burden on Szoka is, thus, extreme: he must not only convince the Court that the FCC's now-extinct ban on low power broadcasts was improper, he must persuade the Court that the impropriety of the FCC's rules would justify this Court's refusal to enforce an otherwise "regularly made" Cease and Desist Order, thereby permitting him to broadcast without a license. Because the Court concludes that Szoka has no constitutional right to broadcast without a license, the Court must grant the FCC's request for an injunction, regardless of its views on the wisdom or legality of the FCC's longstanding ban on Class D broadcasting.

b.

The Supreme Court has repeatedly held that the First Amendment does not confer upon anyone a right to broadcast without a license. See National Broadcasting Co. v. United States,

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319 U.S. 190, 227 (1943) ("the fight of free speech does not include, however, the right to use the facilities of radio without a license"); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 388 (1969) ("when there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unabridgeable First Amendment right to broadcast comparable to

the right of every individual to speak, write or publish"); Turner Broadcasting System v. FCC, 512 U.S. 622, 638 (1994) (declining to re-evaluate the scarcity rationale, upon which broadcasting First Amendment jurisprudence is based).[6]

As the Supreme Court explained in National Broadcasting, when assessing the FCC's refusal to license broa-

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[6]In Red Lion, the Court set out its reasoning behind the specialized First Amendment jurisprudence in the area of broadcasting based upon the scarcity of the broadcasting spectrum.

> The right of free speech of a broadcaster, the user or a sound truck, or any other individual does not embrace the right to snuff out the free speech of others. Associated Press v. United States, 326 U.S. 1,20 (1945). When two people converse face to face, both should not speak at once if either is to be clearly understood. But the range of the human voice is so limited that there could be meaningful communications if half the people in the United States were talking and the other half listening. Just as clearly, half the people might publish and the other hail read. But the reach of the radio signals is incomparatively greater than the range of the human voice and the problem of interference is a massive reality. The lack of know-how and equipment may keep many from the air, but only a tiny fraction of those with resources and intelligence can hope to communicate by radio at the same time if intelligible communication is to be had, even if the entire radio spectrum is utilized in the present state of commercially acceptable technology.
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> Red Lion, 395 U.S. at 388.

dcasters engaged in chain broadcasting:

> The question here is simply whether the Commission, by announcing that it will refuse licenses to persons who engage in specified network practices (a basis for choice which we hold is comprehended within the statutory criterion of 'public interest'), is thereby denying such persons the constitutional right of free speech. The right of free speech does not include, however, the right to use the facilities of radio without a license. The licensing system established by Congress in the Communications Act of
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> 1934 was a proper exercise of its power over commerce. The standard it provided for the licensing of stations was the 'public interest, convenience, or necessity.' Denial of a station license on that ground, if valid under the Act, is not a denial of free speech.

National Broadcasting Co, Inc., 319 U.S. at 226. Thus, even if Szoka is correct in his belief that the FCC's regulations prohibiting the licensing of new Class D stations are unconstitutional, Szoka has no right to simply broadcast without a license. He must first seek review of those standards with the FCC and appeal such review in the manner dictated under the Act. See U.S. v. Dunifer, 997 F.Supp. 1235, 1239 (1998); U.S. v. Neset, 10 F.Supp.2d 1113, 1115 (1998); Luz v. FCC, 1999 WL 554064, *3 (E.D. Pa. 1999); U.S. v Any and All Radio Station Transmission Equipment, 169 F.3d 548, 554 (8th Cir. 1999)(re-

hearing granted, 182 F.3d 1026 (8th Cir. Aug. 2, 1999); Free Speech v. Reno, 1999 WL 147743, *4 (S.D.N.Y. 1999). Szoka's belief that resort to the FCC for a review of its own licensing procedures would be futile because the FCC is not likely to find its own long-standing rules to have been improper, does not alter the fact that Szoka must follow the course (and the appellate procedure) dictated by the Act. And, it does not alter the fact that Szoka has no constitutional right, under the First Amendment or otherwise, to broadcast in derogation of the Act or rules promulgated by the FCC thereunder.

c.

Though Szoka's constitutional and statutory defenses, for the above reasons, are irrelevant to this Court's decision to issue an injunction, the Court makes the following few observations. First, Szoka's claim that the licensing scheme is unconstitutional because it gives standardless discretion to the FCC is quixotic in light of long-standing Supreme Court precedent

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to the contrary. The Supreme Court has repeatedly upheld the regulatory power granted to the FCC in the Communications Act of 1934, finding that the Act's obligation to consider the "public interest" sufficiently limits the FCC's licensing discretion. See National Broadcasting Co. v. United States, 319 U.S. 190, 227 (1943); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 388 (1969); Columbia Broadcasting System, Inc. v. Democratic National Committee, 412 U.S. 94 (1973); FCC v. National Citizens Committee for Broadcasting, 436 U.S. 775 (1978); FCC v. National Citizens Committee for Broadcasting, 436 U.S. 775 (1978); FCC v. WNCN Listener's Guild, 450

U.S. 582, 596 (1980); CBS. Inc. v. FCC, 453 U.S. 367, 395 (1981); but see FCC v. League of Women Voters of Cal., 468 U.S. 364, 377 (1984) (finding unconstitutional an FCC rule which forbids any noncommercial educational broadcasting station which receives a grant from the Corporation for Public Broadcasting to "engage in editorializing"); Turner Broadcasting System, Inc. v. FCC, 512 U.S. 622, 638 (1994) (holding that cable regulations are subject to a higher degree of scrutiny than broadcasting because frequency scarcity is not a problem). Szoka's argument on this point is neither new nor persuasive.

Szoka's argument that the FCC's long-standing ban on low power radio is unconstitutional because it did not properly take account of the "public interest," however, does have some force. On this point, Szoka's constitutional and statutory challenges to the ban collapse into the same argument. The Supreme Court has observed that the public interest standard imposed upon the FCC by Congress necessarily invites reference to First Amendment principles. See Metro Broadcasting v. FCC, 497 U.S. 547, 567 (1990) (overruled by Adarand v. Pena, 515 U.S. 200 (1995) on other grounds); FCC v. National Citizens Committee for

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Broadcasting, 436 U.S. 775, 795 (1978). And, that "safeguarding the public's right to receive a diversity of views and information over the airwaves is therefore an integral component of the FCC's mission." See Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 567 (1990). Thus, the FCC does have a duty to consider the fights of listeners "and their collective right to have the medium function with the ends and purposes of the First Amendment." See Red Lion, 395 U.S. at 390 ("it is the right of the viewers arid listeners, not the right of the broadcasters which is

paramount"). Any violation of that duty would, accordingly, not only run afoul of the FCC's statutory mandate, but would raise First Amendment implications which the courts could not ignore.

It does appear that the FCC's ban on low-power radio had the effect of giving access to the airwaves only to those who are wealthy enough to afford the expensive equipment necessary to broadcast over 100 watts. This was the ease, moreover, long after the equipment to broadcast cleanly and without interference was readily available to those who wanted to broadcast at a lower power level and after it had become clear that ample space existed on the broadcast spectrum to accommodate low-power broadcasts. See Low Power FM Radio, Notice of Proposed Rule Making (Jan. 28, 1999) (stating that the FCC has the ability to license "hundreds of thousands" of low-power radio stations). If that is the ease, it is certainly arguable that the ban came dangerously close to, if it did not actually step over the line of, "choos[ing] among applicants on the basis of their political, economic or social views, or upon any other capricious basis," which would be inconsistent with both the constitution and the FCC' s statutory mandate. See National Broadcasting, 319 U.S. at 226. Though the FCC's "judgment regarding how the public interest is best served is entitled to substantial judicial deference," WNCN Listener's

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Guild, 450 U.S. 582, 596 (1980), that deference would not require a court to countenance a ban that flies in the face of the FCC's mission and, consequently, the First Amendment.

Logic dictates that it is the most disenfranchised

groups whose voices will be silenced by a ban whose effect is to make use of the airwaves prohibitively expensive. Based on the limited record before it, the Court is inclined to agree that the FCC's non-commercial low-power broadcasting ban smacks of favoritism towards wealthier interest groups who do not wish to share the airwaves with non-commercial stations. The ban seems to have placed impenetrable barriers in front of new and diverse voices who wish to begin broadcasting without moving up the ladder of a larger, established station, and to have done so with little technological support for its implementation and long employment. It is not difficult to conclude that such a ban would run contrary to the FCC's obligation to distribute the airwaves in a manner that furthers the "public interest" and, thus, would be inconsistent with the First Amendment.[7]

As explained above, however, this is not the correct forum to bring a direct challenge to the FCC's ban on low-power radio, making this Court's views of that ban irrelevant. These views have, moreover, been developed on a very meager record. Szoka, though strenuously asserting Iris belief that the FCC ban had a content-based impact, offered little evidence to support that belief. And, the United States, correctly believing the issue to be irrele-

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[7]The FCC's recent promulgation of its new regulations allowing low-power broadcasting may prove the Supreme Court's statement in National Broadcasting, true: "If time and changing circumstances reveal that the 'public interest' is not served by application of the regulations, it must be assumed that the Commission will act in accordance with its statutory obligations." National Broadcasting Co., 319 U.S. at 225. The FCC appears, finally, to have done just that.

vant to this

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Court's determination, made no effort to rebut Szoka's concerns. For these reasons as well, the Court cannot and will not rule definitively on Szoka's attacks on the FCC's now defunct ban on micro-broadcasting, leaving the question to another day and another forum.

III. CONCLUSION

As the United States has shown that the Cease and Desist Order was regularly made and duly served and that Szoka continues to defy this Order, and as Szoka has no meritorious defense to the Court's issuance of this injunction, the plaintiff's motion for a preliminary and permanent injunction is GRANTED. The defendant is ordered to comply with paragraph 24 of the FCC Cease and Desist Order issued on June 15, 1999.

IT IS SO ORDERED.

s/_____
KATHLEEN McDONALD O'MALLEY
UNITED STATES DISTRICT JUDGE

U.S. CONSTITUTION

AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

THE CODE OF LAWS OF THE UNITED STATES OF AMERICA

TITLE 47 -- TELECOMMUNICATION

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47 U.S.C. Sec. 301. License for radio communication or transmission of energy

It is the purpose of this chapter, among other things, to maintain the control of the United States over all the channels of radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority, and no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license. No person shall use or operate any apparatus for the transmission of energy or communications or signals by radio:

(a) from one place in any State, Territory, or possession of the United States or in the District of Columbia to another place in the same State, Territory, possession, or District; or

(b) from any State, Territory, or possession of the United States, or from the District of Columbia to any other State, Territory, or possession of the United States; or

(c) from any place in any State, Territory, or possession of the United States, or in the District of Columbia, to any place in any foreign country or to any vessel; or

(d) within any State when the effects of such use extend beyond the borders of said State, or when interference is caused by such use or operation with the transmission of such energy, communications, or signals from within said State to any place beyond its borders, or from any place beyond its borders to any place within said State, or with the transmission or reception of such energy, communications, or signals from and/or to places beyond the borders of said State; or

(e) upon any vessel or aircraft of the United States (except as provided in section 303(t) of this title); or

(f) upon any other mobile stations within the jurisdiction of the United States,

except under and in accordance with this chapter and with a license in that behalf granted under the provisions of this chapter.

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47 U.S.C. Sec. 312. Administrative sanctions

(a) Revocation of station license or construction permit

The Commission may revoke any station license or construction permit -

(1) for false statements knowingly made either in the application or in any statement of fact which may be required pursuant to section 308 of this title;

(2) because of conditions coming to the attention of the Commission which would warrant it in refusing to grant a license or permit on an original application;

(3) for willful or repeated failure to operate substantially as set forth in the license;

(4) for willful or repeated violation of, or willful or repeated failure to observe any provision of this chapter or any rule or regulation of the Commission authorized by this chapter or by a treaty ratified by the United States;

(5) for violation of or failure to observe any final cease and desist order issued by the Commission under this section;

(6) for violation of section 1304, 1343, or 1464 of title 18; or

(7) for willful or repeated failure to allow reasonable access to or to permit purchase of reasonable amounts of time for the use of a broadcasting station by a legally qualified candidate for Federal elective office on behalf of his candidacy.

(b) Cease and desist orders

Where any person

(1) has failed to operate substantially as set forth in a license,

(2) has violated or failed to observe any of the provisions of this chapter, or section 1304, 1343, or 1464 of title 18, or

(3) has violated or failed to observe any rule or regulation of the Commission authorized by this chapter or by a treaty ratified by the United States, the Commission may order such person to cease and desist from such action.

(c) Order to show cause

Before revoking a license or permit pursuant to subsection (a) of this section, or issuing a cease and desist order pursuant to subsection (b) of this section, the Commission shall serve upon the licensee, permittee, or person involved an order to show cause why an order of revocation or a cease and desist order should not be issued. Any such order to show cause shall contain a statement of the matters with respect to which the Commission is inquiring and shall call upon said licensee, permittee, or person to appear before the Commission at a time and place stated in the order, but in no event less than thirty days after the receipt of such order, and give evidence upon the matter specified therein; except that where safety of life or property is involved, the Commission may provide in the order for a shorter period. If after hearing, or a waiver thereof, the Commission determines that an order of revocation or a cease and desist order should issue, it shall issue such

order, which shall include a statement of the findings of the Commission and the grounds and reasons therefor and specify the effective date of the order, and shall cause the same to be served on said licensee, permittee, or person.

(d) Burden of proof

In any case where a hearing is conducted pursuant to the provisions of this section, both the burden of proceeding with the introduction of evidence and the burden of proof shall be upon the Commission.

(e) Procedure for issuance of cease and desist order

The provisions of section 558(c) of title 5 which apply with respect to the institution of any proceeding for the revocation of a license or permit shall apply also with respect to the institution, under this section, of any proceeding for the issuance of a cease and desist order.

(f) "Willful" and "repeated" defined
For purposes of this section:

(1) The term "willful", when used with reference to the commission or omission of any act, means the conscious and deliberate commission or omission of such act, irrespective of any intent to violate any provision of this chapter or any rule or regulation of the Commission authorized by this chapter or by a treaty ratified by the United States.

(2) The term "repeated", when used with reference to the commission or omission of any act, means the commission or omission of such act more than once or, if such commission or omission is continuous, for more than one day.

(g) Limitation on silent station authorizations

If a broadcasting station fails to transmit broadcast signals for any consecutive 12-month period, then the station license granted for the operation of that broadcast station expires at the end of that period, notwithstanding any provision, term, or condition of the license to the contrary

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CODE OF FEDERAL REGULATIONS

TITLE 47--TELECOMMUNICATION CHAPTER I--FEDERAL COMMUNICATIONS COMMISSION PART 1--PRACTICE AND PROCEDURE--

47 C.F.R. PART 73--RADIO BROADCAST SERVICES--Table of Contents Subpart B--FM Broadcast Stations

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47 C.F.R. Sec. 73.210. Station classes (1989-1999)

(a) The rules applicable to a particular station, including minimum and maximum facilities requirements, are determined by its class. Possible class designations depend upon the zone in which the station's transmitter is located, or proposed to be located. The zones are defined in Sec. 73.205. Allotted station classes are indicated in the Table of Allotments, Sec. 73.202. Class A, B1 and B stations

may be authorized in Zones I and I-A, Class A, C3, C2, C1, and C stations may be authorized in Zone II.

(b) The power and antenna height requirements for each class are set forth in Sec. 73.211. If a station has an ERP and an antenna HAAT such that it cannot be classified using the maximum limits and minimum requirements in Sec. 73.211, its class shall be determined using the following procedure:

(1) Determine the reference distance of the station using the procedure in paragraph (b)(1)(i) of Sec. 73.211. If this distance is less than or equal to 28 km, the station is Class A; otherwise,

(2) For a station in Zone I or Zone I-A, except for Puerto Rico and the Virgin Islands: (i) If this distance is greater than 28 km and less than or equal to 39 km, the station is Class B1. (ii) If this distance is greater than 39 km and less than or equal to 52 km, the station is Class B.

(3) For a station in Zone II: (i) If this distance is greater than 28 km and less than or equal to 39 km, the station is Class C3. (ii) If this distance is greater than 39 km and less than or equal to 52 km, the station is Class C2. (iii) If this distance is greater than 52 km and less than or equal to 72 km, the station is Class C1. (iv) If this distance is greater than 72 km and less than or equal to 92 km, the station is Class C.

(4) For a station in Puerto Rico or the Virgin Islands: (i) If this distance is less than or equal to 42 km, the station is Class A. (ii) If this distance is greater than 42 km and less than or equal to 46 km, the station is Class B1. (iii) If this distance is greater then 46 km and less than or equal

to 78 km, the station is Class B.

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47 C.F.R. Sec. 73.211. Power and antenna height requirements (1989-1999)

(a) Minimum requirements.

(1) Except as provided in paragraphs (a)(3) and (b)(2) of this section, FM stations must operate with a minimum effective radiated power (ERP) as follows: (i) The minimum ERP for Class A stations is 0.1 kW. (ii) The ERP for Class B1 stations must exceed 6 kW. (iii) The ERP for Class B stations must exceed 25 kW. (iv) The ERP for Class C3 stations must exceed 6 kW. (v) The ERP for Class C2 stations must exceed 25 kW. (vi) The ERP for Class C1 stations must exceed 50 kW. (vii) The minimum ERP for Class C stations is 100 kW.

(2) Class C stations must have an antenna height above average terrain (HAAT) of at least 300 meters (984 feet). No minimum HAAT is specified for Classes A, B1, B, C3, C2, or C1 stations.

(3) Stations of any class except Class A may have an ERP less than that specified in paragraph (a)(1) of this section, provided that the reference distance, determined in accordance with paragraph (b)(1)(i) of this section, exceeds the distance to the class contour for the next lower class. Class A stations may have an ERP less than 100 watts provided that the reference distance, determined in accordance with [[Page 119]] paragraph (b)(1)(i) of this section, equals or exceeds 6 kilometers.

(b) Maximum limits.

(1) Except for stations located in Puerto Rico or the Virgin Islands, the maximum ERP in any direction, reference HAAT, and distance to the class contour for each FM station class are listed below:

Station Class	Maximum ERP	Reference HAAT in meters (ft.)	Class Contour Distance in Kilometers
A	6kW (7.8 dBk)	100 (328)	28
B1	25kW (14.0 dBk)	100 (328)	39
B	50kW (17.0 dBk)	150 (492)	52
C3	25kW (14.0 dBk)	100 (328)	39
C2	50kW (17.0 dBk)	150 (492)	52
C1	100kW (20.0 dBk)	299 (981)	72
C	100kW (20.0 dBk)	600 (1968)	92

(i) The reference distance of a station is obtained by finding the predicted distance to the 1mV/m contour using Figure 1 of Sec. 73.333 and then rounding to the nearest kilometer. Antenna HAAT is determined using the procedure in Sec. 73.313. If the HAAT so determined is less than 30 meters (100 feet), a HAAT of 30 meters must be used when finding the predicted distance to the 1 mV/m contour. (ii) If a station's ERP is equal to the maximum for its class, its antenna HAAT must not exceed the reference HAAT, regardless of the reference distance. For example, a Class A station operating with 6 kW ERP may have an antenna HAAT of 100 meters, but not 101 meters, even though the reference distance is 28 km in both cases. (iii) Except as provided in paragraph (b)(3) of this section, no station will be authorized in Zone I or I-A with an ERP equal to 50 kW and a HAAT exceeding 150 meters. No

station will be authorized in Zone II with an ERP equal to 100 kW and a HAAT exceeding 600 meters. (2) If a station has an antenna HAAT greater than the reference HAAT for its class, its ERP must be lower than the class maximum such that the reference distance does not exceed the class contour distance. If the antenna HAAT is so great that the station's ERP must be lower than the minimum ERP for its class (specified in paragraphs (a)(1) and (a)(3) of this section), that lower ERP will become the minimum for that station. (3) For stations located in Puerto Rico or the Virgin Islands, the maximum ERP in any direction, reference HAAT, and distance to the class contour for each FM station class are listed below

Station Class	Maximum ERP	Reference HAAT in meters (ft.)	Class Contour Distance in Kilometers
A	6kW (7.8 dBk)	240 (787)	42
B1	25kW (14.0 dBk)	150 (492)	46
B	50kW (17.0 dBk)	472 (1549)	78

(c) Existing stations. Stations authorized prior to March 1, 1984 that do not conform to the requirements of this section may continue to operate as authorized. Stations operating with facilities in excess of those specified in paragraph (b) of this section may not increase their effective radiated powers or extend their 1 mV/m field strength contour beyond the location permitted by their present authorizations. The provisions of this section will not apply to applications to increase facilities for those stations operating with less than the minimum power specified in paragraph (a) of this section.

47 C.F.R. Sec. 73.511. Power and antenna height requirements (1989-1999)

(a) No new noncommercial educational station will be authorized with less power than minimum power requirements for commercial Class A facilities. (See Sec. 73.2-11.)

(b) No new noncommercial educational FM station will be authorized with facilities greater than Class B in Zones I and I-A or Class C in Zone II, as defined in Sec. 73.211.

(c) Stations licensed before December 31, 1984, and operating above 50 kW in Zones I and I-A, and above 100 kW and in Zone II may continue to operate as authorized.

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47 C.F.R. Sec. 73.512. Special procedures applicable to Class D noncommercial educational stations (1985-2000)

(a) All Class D stations seeking renewal of license for any term expiring June 1, 1980, or thereafter shall comply with the requirements set forth below and shall simultaneously file an application on FCC Form 340, containing full information regarding such compliance with the provisions set forth below.

(1) To the extent possible, each applicant shall select a commercial FM channel on which it proposes to operate in lieu of the station's present channel. The station may select any commercial channel provided no objectionable interference, as set forth in Sec. 73.509(b), would be caused. The application shall include the same engineering

information as is required to change the frequency of an existing station and any other information necessary to establish the fact that objectionable interference would not result. If no commerical channel is available where the station could operate without causing such interference, the application shall set forth the basis upon which this conclusion was reached.

(2) If a commercial channel is unavailable, to the extent possible each applicant should propose operation on Channel 200 (87.9 MHz) unless the station would be within 402 kilometers (250 miles) of the Canadian border or 320 kilometers (199 miles) of the Mexican border or would cause interference to an FM station operating on Channels 201, 202, or 203 or to TV Channel 6, as provided in Sec. 73.509.

(3) If a channel is not available under either paragraph (a) (1) or (2) of this section, the renewal applicant shall study all 20 noncommercial educational FM channels and shall propose operation on the channel which would cause the least preclusion to the establishment of new stations or increases in power by existing stations. Full information regarding the basis for the selection should be provided.

(b) At any time before the requirements of paragraph (a) become effective, any existing Class D station may file a construction permit application on FCC Form 340 to change channel in the manner described above which shall be subject to the same requirements. In either case, any license granted shall specify that the station's license is for a Class D (secondary) station.

(c) Except in Alaska, no new Class D applications nor major change applications by existing Class D stations are

acceptable for filing except by existing Class D stations seeking to change frequency. Upon the grant of such application, the station shall become a Class D (secondary) station.

(d) Class D noncommercial educational (secondary) stations (see Sec. 73.506(a)(2)) will be permitted to continue to operate only so long as no interference (as defined in Sec. 73.509) is caused to any TV or commercial FM broadcast stations. In the event that the Class D (secondary) station would cause interference to a TV or commercial FM broadcast station after that Class D (secondary) station is authorized, the Class D (secondary) station must cease operation when program tests for the TV or commercial FM broadcast station commence. The Class D (secondary) station may apply for a construction permit (see Sec. 73.3533) to change to another frequency or antenna site where it would not cause interference (as defined in Sec. 73.509). If the Class D (secondary) station must cease operation before the construction permit is granted, an application for temporary authorization (pursuant to Sec. 73.3542) to operate with the proposed facilities may be submitted; where appropriate, such temporary authorization can be granted.

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(2)

Supreme Court, U.S.
FILED
JUL 29 2002

No. 01-1662

In the Supreme Court of the United States

GRID RADIO AND JERRY SZOKA, PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether petitioners' First Amendment rights were violated by the imposition of a fine and the issuance of a cease and desist order for broadcasting without a license in violation of the Communications Act of 1934, 47 U.S.C. 301.

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In the Supreme Court of the United States

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GRID RADIO AND JERRY SZOKA, PETITIONERS

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A16) is reported at 278 F.3d 1314. The order of the Federal Communications Commission (Pet. App. A17-A35) is reported at 14 F.C.C.R.2d 9857.

JURISDICTION

The judgment of the court of appeals was entered on February 8, 2002. The petition for a writ of certiorari was filed on May 8, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In September 1995, without having applied for a broadcasting license, Szoka (petitioner) began operat-

ing an FM station known as "Grid Radio" from "The Grid" nightclub in downtown Cleveland. Pet. App. A3, A19. On February 20, 1997, after receiving a complaint about this unlicensed station, the Federal Communications Commission (FCC or the Commission) sent a letter to petitioner warning that operation of a radio station without a license violates 47 U.S.C. 301 and could subject him to penalties. A second warning letter was sent on June 11, 1997. Pet. App, A3-A4, A20. Despite receiving these warning letters, petitioner continued to broadcast without a license. *Id.* at A20.

On April 6, 1998, after confirming that Grid Radio was still on the air, the Commission issued an order directing petitioner to show cause why he should not be ordered to cease and desist from violating the Communications Act of 1934 (Act), 47 U.S.C. 301. Pet. App. A18. On September 4, 1998, over petitioner's objection, the administrative law judge (ALJ) to whom the matter had been assigned issued a summary decision ordering petitioner to cease and desist his unlicensed broadcasting. *Id.* at A19.

In the course of this proceeding, petitioner challenged on First Amendment grounds the FCC's "microbroadcasting ban," which proscribed the issuing of new Class D licenses during the time period in which petitioner was broadcasting.[1] The ALJ "rejected [peti-

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[1] Until 1978, the Commission had provided for the licensing of low power "Class D" noncommercial educational stations (defined as operating with no more than 10 watts). In 1978, in order to promote more efficient operations, "the Commission adopted a 'microbroadcasting ban,'" under which no new Class D applications would be accepted (except for stations in Alaska). Pet. App. A3; see *In re Changes in the Rules Relating to Noncommercial Educational FM Broad. Stations*, 70 F.C.C.2d 972, 983 (1979) (codified at 47 C.F.R. 73.512(d)).

tioner's] constitutional challenges to the microbroadcasting ban" on two grounds. First, the ALJ noted that petitioner's challenge was without substantive merit because the "right of free speech does not include the right to use radio facilities without a license." Pet. App. A5. Second, the ALJ held that petitioner lacked standing to challenge the microbroadcasting ban because petitioner had "failed to apply for either a license or a waiver of the microbroadcasting ban." *Ibid.* The ALJ also imposed a forfeiture of $11,000 for petitioner's violation of Section 301.[2] That amount was warranted, the ALJ concluded, because petitioner's unauthorized broadcast operation was willful and had continued even after the FCC had explicitly warned petitioner (on two occasions) that he was acting in violation of federal law. *Ibid.*

On June 15, 1999, the Commission affirmed the ALJ's Summary Decision. The Commission held that petitioner's First Amendment objections to the FCC's licensing rules, even if valid, did not excuse his unlicensed radio operation, because this Court has held repeatedly that there is no First Amendment right to broadcast without a license and that the FCC has authority to regulate the radio spectrum. Pet. App. A5. The Commission also found that petitioner lacked standing to challenge the licensing regulations because he had never applied for a license or a waiver. *Id.* at A27-A28. If petitioner had made such a request and

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[2] The relevant forfeiture statute authorizes a penalty of $11,000 per day of each continuing violation, up to a maximum of $82,500 for each act. Pet. App. A18-A19 (citing 47 U.S.C. 503(b)(2)(C); 47 C.F.R. 1.80(b)(3), (4) and (5)). Petitioner, who operated without a license for more than five years, was penalized well below the maximum amount authorized.

that request had been denied, he could have sought judicial review and challenged the constitutionality of the FCC's rules as applied to him. As the Commission explained, it must give "serious consideration" to a license applicant's waiver request, and "must 'articulate with clarity and precision its findings and the reasons for its decisions.'" *Id.* at A28-A29 (quoting *WAIT Radio* v. *FCC*, 418 F.2d 1153, 1156 (D.C. Cir. 1969)). The Commission also noted that, in any event, petitioner's claims—that its licensing rules were overbroad, content-based, and not reasonably related to the objectives of the Act—were without merit. It explained that, because its technical rules "are not content-based," they are not subject to strict scrutiny and pass constitutional muster. *Id.* at A29.[3] The Commission subsequently denied petitioner's petition for reconsideration and request for a stay. *Id.* at A36.

2. Notwithstanding the Commission's cease and desist order, petitioner continued to broadcast without a license. Pet. App. A76, A80. To enforce its order, the Commission filed suit in the United States District Court for the Northern District of Ohio. Pursuant to 47 U.S.C. 401(b), the Commission sought a declaration that the cease and desist order was "regularly made and duly served," and requested a preliminary and permanent injunction to stop petitioner from violating the order by continuing to broadcast without a license. On February 23, 2000, after a combined preliminary injunction hearing and trial on the merits, the district

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[3] The Commission also affirmed the forfeiture ordered by the ALJ. Pet. App. A31-A33 (holding that forfeiture was not an excessive fine under the Eighth Amendment, and that the statutory scheme set out in 47 U.S.C. 503(b) authorizing assessment of monetary forfeitures satisfies due process requirements).

court granted the government's request and ordered petitioner to cease unauthorized radio transmissions by March 1, 2000. Pet. App. A73.

The district court held that, because Congress had provided for an injunction by statute, an injunction could be obtained simply by showing that all of the statutory requirements had been met. The district court rejected petitioner's suggestion that the court should take into account equitable factors and should refuse to issue an injunction because of petitioner's claim that the harm to him and his listeners outweighed the harm caused by his unlicensed broadcasting. The district court observed that "[petitioner] understates the importance of the FCC's regulatory function when he asks this Court to second-guess or interfere with it, * * * and ignores the harm to that authority which would flow from his unchecked unilateral decision to flout it." Pet. App. A85. As the court explained, "[i]f radio stations could broadcast without a license so long as they claim to serve some segment of the public not currently being served by other radio stations, the structure set up by Congress in the Communications Act of 1934 to stop a 'cacophony of competing voices, none of which could be clearly and predictably heard,' without some control, would be impotent." *Ibid.* (quoting *Red Lion Broad.* v. *FCC*, 395 U.S. 367, 376 (1969)). The United States Court of Appeals for the Sixth Circuit affirmed. *Id.* at A44-A72.

3. While that litigation was pending in the Sixth Circuit, petitioners pursued an appeal of the Commission's cease and desist order in the D.C. Circuit. Petitioners contended that the enforcement order—and the micro-broadcasting ban giving rise to it—was unconstitutional and was not in the public interest. On February 8, 2002, the D.C. Circuit upheld the Commission's cease

and desist order, as well as the $11,000 forfeiture. The court of appeals first rejected the Commission's argument that petitioner lacked standing to challenge the Commission's microbroadcasting regulations because he had failed to apply for a license or to seek a waiver of the microbroadcasting ban. It explained that the enforcement order presents injuries "fairly, if circuitously, traceable to the Commission's microbroadcasting ban." Pet. App. A8.

Reaching the merits, the court of appeals concluded that the Commission, having considered the policy arguments in a rulemaking, was not required to consider the individual circumstances relating to Grid Radio before taking enforcement action, thereby rejecting petitioners' contention that shutting down Grid Radio was inconsistent with the public interest. Pet. App. A10-A13. The court noted that allowing petitioner to broadcast without a license "as a means of challenging the microbroadcasting ban * * * could produce the very 'chaos' that * * * the broadcasting licensing regime was designed to prevent," and it noted that petitioner could have challenged the constitutionality of the ban without resorting to unlicensed broadcasts. *Id.* at A11 (quoting *Red Lion Broad.*, 395 U.S. 367, 375 (1969). The court accordingly concluded that it would be appropriate in this enforcement action to entertain a challenge to the constitutionality of the microbroadcasting ban only if there were an undisputable indication of the ban's unconstitutionality. *Id.* at A10-A14. The court ruled that this standard was not met here. *Id.* at A12, A14.[4]

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[4] The D.C. Circuit also upheld the $11,000 forfeiture against petitioners' Eighth Amendment challenge. Pet. App. A14-A16. Petitioners do not renew that claim here.

4. In January 2000, the FCC adopted new rules authorizing the licensing of two new classes of noncommercial educational FM radio stations, one operating at a maximum of 10 watts and one at a maximum of 100 watts. *In re Creation of Low Power Radio Serv.* (*Low Power Rule Making Order*), 15 F.C.C.R. 2205. "The order encouraged local ownership of low-power stations, limited the number of such stations any single entity could own, required the stations to operate on a noncommercial, educational basis, and prohibited existing media entities from holding interests in them." *Ruggiero* v. *FCC*, 278 F.3d 1323, 1326 (2002), vacated, No. 00-1100, 2002 WL 1359486 (D.C. Cir. May 2, 2002).

While petitions for review of the *Low-Power Rulemaking Order* were pending, Congress enacted legislation—known as the Radio Broadcasting Preservation Act of 2000 (Act of Dec. 21, 2000, Pub. L. No. 106-553, § 632, 114 Stat. 2762A-111 to 2762A-112 (repealed by Act of Dec. 21, 2000, Pub. L. No. 106-554, § 406, 114 Stat. 2763A-189))—that, among other things, directed the "Commission to amend the low-power rules to limit the frequencies available for low-power stations, thus reducing the risk of interference to existing stations." *Ruggiero*, 278 F.2d at 1326. Although Congress thus cut back on the opportunities for low-power FM stations that the Commission's rulemaking had created, the ban on microbroadcast licensing about which petitioners complain no longer exists. *Ibid.* Petitioner has not, however, applied for a license under the new regulatory regime, nor does he challenge that new regime here. Pet. App. A7.

ARGUMENT

Because the challenged regulation is no longer in effect, this case does not merit review by this Court.

Moreover, the decision of the court of appeals is correct and does not conflict with any decision of this Court or any court of appeals. Review is therefore not warranted.

1. Petitioners acknowledge that the regulation they challenge is no longer in effect. Pet. 5. Thus, resolution of the ultimate question in the case—whether that regulation was constitutional at the time it was in effect —will affect few, if any, cases other than this one. The adoption of more liberal broadcasting regulations and the elimination of the microbroadcasting ban obviate the need for this Court to consider petitioners' constitutional challenge to the superseded ban.[5] Moreover, a case involving an extant regulation would provide a more appropriate vehicle for resolution of any subsidiary issues related to the constitutional claim, such as the proper standard of review.

2. Furthermore, the outcome in the court of appeals —affirmance of the Commission's enforcement order against petitioner—was correct. Federal law has long provided that it is unlawful to operate a radio station without an FCC license. 47 U.S.C. 301 ("No person shall use or operate any apparatus for the transmission of energy or communications or signals by radio * * * except under and in accordance with this chapter and with a license in that behalf granted under the provisions of this chapter."). This Court has, for nearly 60

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[5] Nor did the standard of review adopted by the court of appeals leave would-be broadcasters without a method for raising challenges to such regulations. Petitioners could have applied for a license or requested a waiver and challenged the policy leading to that decision in the likely event that the application was denied. Petitioners' constitutional claim would be more cleanly presented in that procedural context, where this Court would not have to address whether petitioners had standing.

years, consistently rejected challenges to the requirement that all broadcasters be licensed, holding that "[t]he right of free speech does not include * * * the right to use the facilities of radio without a license." *NBC* v. *United States*, 319 U.S. 190, 227 (1943); see *Turner Broad. Sys., Inc.* v. *FCC*, 512 U.S. 622, 638 (1994) ("'[I]t is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write or publish.'") (quoting *Red Lion Broad.*, 395 U.S. 367, 390 (1969)); *Metro Broad., Inc.* v. *FCC*, 497 U.S. 547, 597 (1990) ("'[N]o one has a First Amendment right to a license.'") (quoting *Red Lion Broad.*, 395 U.S. at 389).

Having never applied for a license, petitioners therefore had no constitutional right to broadcast. It follows that the court of appeals was correct in denying petitioners the remedy they sought—non-enforcement against them of the statutory prohibition against unlicensed broadcasting. Even if the court below had agreed with petitioners' challenge to the microbroadcasting regulations and had ultimately concluded that the Commission's refusal to grant licenses for microbroadcasting was unconstitutional, petitioners would have been entitled only to the right to apply for a license with assurance that their status as a microbroadcaster would not prejudice their application; they would not have been entitled to broadcast without a license. See 47 U.S.C. 308(a) ("The Commission may grant construction permits and station licenses, or modifications or renewals thereof, only upon written application therefor received by it."); 47 U.S.C. 308(b) (application for license must "set forth such facts as the Commission by regulation may prescribe as to the citizenship, character, and financial, technical, and other qualifications of the applicant to operate the station").

Thus, even if the court of appeals had agreed with petitioners' contention that the microbroadcasting ban was unconstitutional, petitioners could not have prevailed in the enforcement action against them for unlicensed broadcasting. The court of appeals' decision to uphold the cease and desist order and fine against petitioners therefore was a correct application of settled law.

3. Contrary to petitioners' assertion (Pet. 14-18), the court of appeals' decision in this case does not conflict with any decision of this Court or of any other court of appeals. Petitioners argue that the decision below is inconsistent with the "clear" rule that "the unconstitutionality of a licensing scheme [ha]s always been a defense to its enforcement." Pet. 16. In each of the cases cited by the petitioners, however, the challenge was to the constitutionality of the licensing scheme itself. This case, by contrast, challenges only a particular facet of what has long been held to be a *constitutional* licensing scheme. See *NBC*, *supra*.

Furthermore, the cases cited by petitioners all involve claims of a First Amendment right to speak *without a license*. To the extent that petitioners seek to engage in broadcast speech without a license, that claim is foreclosed by this Court's decisions. The Court has long adhered to its holding in *NBC* that "[t]he right of free speech does not include * * * the right to use the facilities of radio without a license," 319 U.S. at 227. See, *e.g.*, *Red Lion Broad. Co.*, *supra*. Petitioners offer no reason for this Court to reconsider that longstanding precedent.

4. In any event, petitioner's constitutional challenge to the microbroadcasting ban is without merit. Petitioners specifically assert (Pet. 19-20) that the microbroadcasting ban was not narrowly tailored because it

allowed space in the spectrum to go unused. With respect to the claim that the microbroadcasting ban violated the Commission's duty to maximize use of the spectrum, "the Commission resolved just this issue in its 1978 rulemaking when it concluded that licensing low-power stations would interfere with the propagation of higher-power stations." Pet. App. A12.

At the time petitioner broadcast without a license, the Commission had reasonably concluded that its spectrum management policies—which restricted low-power broadcasting—promoted both efficient and equitable use of the spectrum. As the Commission explained below, in fulfilling Congress's mandate to distribute radio services in a "fair, efficient, and equitable" manner, see 47 U.S.C. 307(b), "the Commission has allotted stations to communities throughout the United States and has assigned their frequency and power levels to accommodate the goals of utilizing the spectrum efficiently, achieving a wide distribution of stations, allowing each station to serve as many people as possible, and allowing numerous stations to be licensed." Pet. App. A29-A30. In particular, the Commission limited "the size of stations and [did] not permit the highest power possible because that would reduce the number of stations and undermine the Commission's goal of promoting diversity of voices." *Id.* at A30. See *In re Application for Review of Stephen Paul Dunifer*, 11 F.C.C.R. 718, 721-725 (1995). The court of appeals held that there was no need for the Commission to revisit this policy determination in an enforcement proceeding. Pet. App. A14 ("[Petitioner] offers no evidence to suggest that his circumstances were so unique as to impose on the Commission a constitutional

obligation to apply the ban differently to him than to any other unlicensed microbroadcaster.").[6]

Petitioners' assertion (Pet. 19) that the microbroadcasting ban was not a narrowly tailored means of achieving a substantial government interest fails to acknowledge that, as this Court has recognized since *NBC*, *supra*, there is a substantial government interest in protecting the listening public as well as licensed broadcasters from interference with the broadcast airwaves. See *Prayze FM* v. *FCC*, 214 F.3d 245, 252-253 (2d Cir. 2000) ("The prohibition of microbroadcasting was designed to further the substantial government interest in allowing other broadcasters to operate free of interference"). Because it is established that such an interest is substantial, it follows that the microbroadcasting ban—coupled with the availability of lawful means of challenging the ban, such as filing an application and seeking a waiver—was a narrowly tailored means of protecting that interest. See *Prayze FM*, 214 F.3d at 251 (observing that a facial challenge to the Commission's microbroadcasting ban was unlikely to prevail on the merits).[7]

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[6] In both the companion case to this one in the Sixth Circuit, and in similar cases in other circuits, other courts of appeals have similarly declined to consider individualized arguments in upholding enforcement orders preventing microbroadcasters from broadcasting without a license. See, *e.g.*, *United States* v. *Szoka*, 260 F.3d 516 (6th Cir. 2001) (Pet. App. A44-A72); *United States* v. *Neset*, 235 F.3d 415 (8th Cir. 2000), cert. denied, 122 S. Ct. 61 (2001); *United States* v. *Dunifer*, 219 F.3d 1004 (9th Cir. 2000).

[7] Insofar as the current manner of the FCC's licensing of microbroadcasters may raise any constitutional questions, such questions are not presented by this case but are under consideration at this time in unrelated cases involving challenges to the constitutionality of provisions of the Radio Broadcasting Preservation Act of 2000. See *Ruggiero* v. *FCC*, No. 00-1100 (D.C. Cir. filed Mar. 16,

For all of these reasons, this Court's review is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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2000); *Prayze FM* v. *FCC*, 83 Civil No. 3:98CV375 (D. Conn. filed Feb. 25, 1998).

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IN THE

Supreme Court of the United States

GRID RADIO AND JERRY SZOKA,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR RESPONDENT NATIONAL ASSOCIATION OF BROADCASTERS IN OPPOSITION

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QUESTIONS PRESENTED

1. Is there a constitutional right to violate federal law by engaging in radio broadcasting without a license?

2. Can an individual avoid sanction for broadcasting without a license in violation of federal law by asserting that a specific rule of the Federal Communications Commission concerning the operation of FM radio stations was contrary to the First Amendment?

3. Did a former rule of the Federal Communications Commission requiring FM radio stations to operate at certain minimum power levels violate the First Amendment?

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, respondent National Association of Broadcasters (NAB) states as follows:

> NAB is a non-profit, incorporated association of radio and television stations and broadcasting networks which serves and represents the American broadcasting industry. NAB has not issued any shares or debt securities to the public. NAB has no parent company, and no publicly held company owns 10% or more of NAB's stock.

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IN THE

Supreme Court of the United States

No. 01-1662

GRID RADIO AND JERRY SZOKA,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR RESPONDENT NATIONAL ASSOCIATION OF BROADCASTERS IN OPPOSITION

Grid Radio and Jerry Szoka (Petitioners) seek review of a decision of the United States Court of Appeals for the District of Columbia Circuit affirming an order of the Federal Communications Commission (FCC or Commission) directing Mr. Szoka to cease his unlicensed radio broadcasting and imposing a monetary forfeiture. The Petitioners fail, however, to identify any circumstances warranting review by this Court. The instant case simply does not present the principal question posed in the petition for certiorari—namely, whether Petitioners can be subject to government sanction without being allowed to challenge the constitutionality of the law being enforced against it. *See* Petition at 12-13. That is so because Petitioners' conduct violated the bedrock prohibition

against broadcasting without a license. Prior decisions of this Court have made clear that Petitioners had no constitutional or statutory right to broadcast without a license, even if a specific FCC policy concerning the operation of FM radio stations that Petitioners challenge had been constitutionally suspect (which it was not).

Congress in the Communications Act of 1934 expressly prohibited broadcasting without a license, a prohibition that Petitioners admittedly violated. This Court nearly six decades ago determined that the broadcast licensing system established in the Communications Act passes constitutional muster, and that the First Amendment right of free speech does not include the right to broadcast without a license. Because there is no statutory or constitutional right to broadcast without a license, Mr. Szoka was not legally entitled to operate his unlicensed low power radio station, even if the FCC's rules formerly requiring FM radio stations to operate at certain minimum power levels had been constitutionally suspect. Thus, if certiorari were granted, this Court would not have the opportunity to reach the question whether Petitioners were denied a right to challenge the constitutionality of the then-existing low power broadcasting (or "microbroadcasting") rules of the FCC. Petitioners were in acknowledged violation of a requirement whose constitutionality they did not seek to challenge below and do not raise in this Court—the requirement that they obtain a license before broadcasting.

The decisions of this and other courts relied upon by Petitioners as allegedly justifying their "speaking" (*i.e.*, broadcasting) without a license are, moreover, completely inapposite to the instant case because they involve various *nonbroadcast* licensing or permitting requirements that were (unlike the clearly constitutional broadcast licensing system) ultimately found by reviewing courts to be constitutionally infirm. And in the nonbroadcast licensing and permitting

cases cited by Petitioners, the parties—unlike Mr. Szoka in the instant case—would have been entitled to simply start "speaking" once the permitting scheme at issue had been found constitutionally infirm. By contrast, even a court decision invalidating on some basis the FCC's former low power broadcasting rules would not have justified Petitioners commencing broadcast operations without a license in violation of federal law, nor automatically entitled Mr. Szoka to obtain a broadcast license, given the citizenship, character and other requirements necessary for FCC licensure. Regardless of the constitutionality of the FCC's previous low power broadcasting regulations, the court of appeals therefore properly affirmed the FCC's order directing Mr. Szoka to cease his unlicensed broadcasting and imposing a monetary forfeiture. Especially in light of Mr. Szoka's decision to simply start broadcasting without a license, rather than challenge the constitutionality of the FCC's microbroadcasting rules through legally available means, no circumstances warrant review of the circuit court's decision.

Review of the second question presented in the petition for certiorari is not warranted because the FCC's rules formerly requiring FM radio stations to operate at certain minimum power levels did not violate the First Amendment, or even raise any serious constitutional questions. Those rules have also been significantly altered by recent Commission and Congressional action, and there is no reason for this Court to review agency regulations that no longer exist. Accordingly, the petition should be denied.

STATEMENT

Respondent National Association of Broadcasters (NAB) accepts the statement of the case set forth in the brief in opposition of respondent FCC.

REASONS FOR DENYING THE PETITION

I. THIS COURT HAS EXPRESSLY DETERMINED THAT THERE IS NO CONSTITUTIONAL RIGHT TO BROADCAST WITHOUT A LICENSE.

In Section 301 of the Communications Act of 1934, 47 U.S.C. § 301, Congress unequivocally stated that no one should operate as a broadcaster without a license:

> It is the purpose of this Act . . . to *maintain the control of the United States over all the channels of radio transmission* . . . . No person shall use or operate any apparatus for the transmission of energy or communications or signals by radio . . . except under and in accordance with this Act *and with a license in that behalf granted under the provisions of this Act.* (emphasis added).

As has been frequently explained, this clear prohibition on unlicensed broadcasting is necessary to prevent the "confusion and chaos" that would occur (and in fact did occur in the past) from the unregulated and unlicensed operation of broadcast facilities. *National Broadcasting Co., Inc. v. United States,* 319 U.S. 190, 212 (1943) (prior to 1927 and passage of Radio Act, "new stations used any frequencies they desired, regardless of the interference thereby caused to others. Existing stations changed to other frequencies and increased their power . . . at will . . . . With everybody on the air, nobody could be heard."). Because "confusion and interference" are created by multiple broadcasters attempting to use the same "limited" number of "available radio frequencies," Congress in the Communications Act had to allocate "available frequencies and . . . regulate the employment of transmission equipment" for the public to receive the "full benefit of radio audition." *FCC v. Sanders Bros. Radio*

Station, 309 U.S. 470, 474 (1940).[1] The court of appeals in this case similarly emphasized that permitting Mr. Szoka "to operate without a license" would "produce the very 'chaos' that, according to the Supreme Court, the broadcasting licensing regime was designed to prevent." *Grid Radio v. FCC*, 278 F.3d 1314, 1321 (D.C. Cir. 2002) (*quoting Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 375-76 (1969)). Pet. App. at A11.

This Court, moreover, determined nearly six decades ago that the licensing system established by Congress in the Communications Act passes constitutional muster, and that the "right of free speech does not include . . . the right to use the facilities of radio without a license." *NBC*, 319 U.S. at 227. During the past 60 years, the courts have not deviated from this determination that requiring a license to broadcast is constitutionally permissible.[2]

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[1] *Accord Turner Broadcasting System v. FCC*, 512 U.S. 622, 637-38 (1994) (because there are more potential broadcasters than available frequencies, "if two broadcasters were to attempt to transmit over the same frequency in the same locale, they would interfere with one another's signals, so that neither could be heard at all"; this physical limit on frequencies requires "the establishment of some regulatory mechanism to divide the electromagnetic spectrum and assign specific frequencies to particular broadcasters").

[2] *See, e.g., Turner*, 512 U.S. at 638 (*quoting Red Lion*, 395 U.S. at 388) ("it is idle to posit an unbridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish"); *United States v. Any and All Radio Station Transmission Equipment*, 218 F.3d 543, 549-50 (6th Cir. 2000) (court held that the First Amendment provided no defense to the forfeiture of the radio transmission equipment of an unlicensed broadcaster because he did "not have a First Amendment right to broadcast his views on an unlicensed radio station"); *United States v. Any and All Radio Station Transmission Equipment*, 204 F.3d 658, 665-66 (6th Cir. 2000) (in a case involving unlicensed microbroadcasters, court observed that the right of free speech did not include the right to broadcast without a license and that "nobody has a First Amendment right to hear radio broadcasts from a station that does not have a First

In light of the six decades of precedent confirming that there is neither a statutory nor a constitutional right to broadcast without a license, "this is a simple case." *United States v. Szoka*, 260 F.3d 516, 522 (6th Cir. 2001) (Sixth Circuit upheld an injunction enforcing FCC cease and desist order against Mr. Szoka's unlicensed operation of a low power radio station on grounds that an "individual cannot broadcast without a license"). Pet. App. at A53. It is not disputed in this case that Mr. Szoka violated Section 301 of the Communications Act by broadcasting without a license. *See Grid Radio*, 278 F.3d at 1316-17 (Pet. App. at A2-A3); Petition at 1-2. The court of appeals therefore properly affirmed the FCC's order directing Mr. Szoka to cease his unlicensed broadcasting and imposing a monetary forfeiture. Indeed, a failure by the court of appeals to uphold the FCC would have contravened the "fundamental purpose of Congress" in passing the Communications Act—to "allocat[e] and regulat[e]" the "use of radio frequencies by *prohibiting such use except under license*." *FCC v. Sanders*, 309 U.S. at 474 (emphasis added).

Amendment right to broadcast them"); *Free Speech ex rel. Ruggiero v. Reno*, 200 F.3d 63, 64 (2nd Cir. 1999) (court rejected argument by unlicensed low power radio station that the licensing scheme embodied in the Communications Act unconstitutionally infringed its First Amendment free speech rights); *United States v. Weiner*, 701 F. Supp. 14, 16 (D. Mass. 1988), *aff'd*, 887 F.2d 259 (1st Cir. 1989) (unlicensed broadcasters cannot "look to the First Amendment for authority to broadcast on an unoccupied frequency" in violation of federal law, as the "First Amendment does not grant anyone the right to broadcast by radio").

II. THE CASES RELIED UPON BY PETITIONERS TO JUSTIFY THEIR UNLICENSED BROADCASTING ARE IRRELEVANT TO THE BROADCASTING LICENSING SYSTEM ESTABLISHED IN THE COMMUNICATIONS ACT AND ARE INAPPOSITE TO THIS CASE.

Petitioners identify a number of decisions of this and other courts purporting to establish that a person may with impunity violate a constitutionally suspect "licensing scheme" by proceeding to speak without obtaining a license. *See* Petition at 14-18. The decisions cited by Petitioners as allegedly justifying their "speaking" (*i.e.*, broadcasting) without a license are, however, completely inapposite to the instant case for two primary reasons. First, these cases involve only *nonbroadcast* licensing and permitting requirements. Second, the various licensing and permitting schemes at issue in these cases were ultimately found to be constitutionally infirm. Thus, the laundry list of court decisions set forth in the Petition simply have no relevance to the instant case, and provide no justification whatsoever for the operation of an unlicensed radio station.

As indicated above, none of the licensing or permitting cases identified in the Petition involve the licensing of broadcasting.[3] That alone is a crucial distinction. As this Court has expressly recognized, there is no "unbridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish." *Turner*, 512

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[3] The cited cases concern licensing or permitting requirements for, *inter alia*, the solicitation of members for an organization (*Staub v. City of Baxley*, 355 U.S. 313 (1958)); engaging in door-to-door canvassing (*Schneider v. State of New Jersey*, 308 U.S. 147 (1939)); the solicitation of money for religious or charitable causes (*Cantwell v. State of Connecticut*, 310 U.S. 296 (1940)); and the distribution or sale of circulars, handbooks or other literature (*Lovell v. City of Griffen*, 303 U.S. 444 (1938)).

U.S. at 388 (*quoting Red Lion*, 395 U.S. at 388).[4] Thus, Mr. Szoka—unlike the nonbroadcast speakers in the cases relied upon by Petitioners—simply had no fundamental constitutional right to speak (*i.e.*, to broadcast) in the first instance. Because Mr. Szoka had no First Amendment right to broadcast that is "comparable" to the essentially "unbridgeable" right to speak, write or publish enjoyed by nonbroadcast speakers, *Turner*, 512 U.S. at 388, the court decisions set forth in the Petition are inapposite to the instant case.

Beyond not addressing unlicensed speech in the context of broadcasting, the cases relied upon by Petitioners involve licensing or permitting schemes that were ultimately found by reviewing courts to be constitutionally infirm.[5] In sharp contrast, this Court has confirmed the constitutionality of the broadcast licensing provisions set forth in the Communications Act, including the provisions prohibiting broadcasting without a license. *NBC*, 319 U.S. at 227 (finding that the "licensing system established by Congress in the Communications Act of 1934 was a proper exercise of its power over commerce" and that requiring a license to engage in broadcasting was "not a denial of free speech").[6] Because the

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[4] *See also NBC*, 319 U.S. at 227 (the "right of free speech does not include . . . the right to use the facilities of radio without a license").

[5] Some of the permitting schemes at issue in these decisions were found unconstitutional on their face, while others were found to be unconstitutional as applied in the particular case. For example, in *Staub*, 355 U.S. at 325, this Court found that a city ordinance prohibiting the solicitation of members for an organization without a permit unconstitutionally abridged freedom of speech. Similarly, in *Lovell*, 303 U.S. 451-52, the Court concluded that a city ordinance prohibiting the distribution of literature of any kind without a permit unconstitutionally abridged freedom of the press. This Court in *Schneider*, 308 U.S. at 165, held another city ordinance, which prohibited door-to-door canvassing without a permit, to be void as applied to the petitioner in the case.

[6] *Accord Ruggiero v. Reno*, 200 F.3d at 64 (affirming the dismissal of a claim by an unlicensed broadcaster that the "broadcast licensing scheme embodied in the [Communications] Act, which generally prohibits broad-

constitutionality of the broadcast licensing system established in the Communications Act has been consistently affirmed by this and other courts, the decisions cited in the Petition—which involve challenges to permitting schemes found by courts to be *invalid*—cannot justify the operation of an unlicensed radio station or the invalidation of a forfeiture for violating the bar on unlicensed broadcasting. Obviously, nonbroadcast cases confirming the First Amendment right of persons to speak without obtaining a license under a constitutionally infirm licensing scheme have no relevance to the instant case, where Mr. Szoka "spoke" without obtaining a license under a statutory broadcast licensing system that this Court determined to be constitutional six decades ago.

III. PETITIONERS HAD NO CONSTITUTIONAL OR STATUTORY RIGHT TO BROADCAST WITHOUT A LICENSE, EVEN IF THE FCC'S PREVIOUS RADIO MINIMUM POWER REQUIRMENTS HAD BEEN CONSTITUTIONALLY SUSPECT.

Because, as described above, there is no statutory or constitutional right to broadcast without a license, Mr. Szoka was not entitled to operate his unlicensed low power radio station, even if the FCC's former rules requiring FM radio stations to operate at certain minimum power levels had been constitutionally suspect (which, as discussed in Section IV below, they were not). Thus, even assuming that the FCC's former regulations requiring minimum power levels for radio stations had somehow infringed upon the First Amendment,

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casting without a license," infringed the First Amendment); *U.S. v. Any and All Radio Station Transmission Equipment*, 204 F.3d at 665-66 (explaining that the Supreme Court in the *NBC* case had "affirmed the Communications Act and its licensing standard"); *U.S. v. Weiner*, 701 F. Supp. at 16 (Section 301 of the Communications Act "which grants the Federal Communications Commission the power to control and regulate channels of radio transmission has been held to be valid").

Mr. Szoka had no right to simply start broadcasting without a license, given the clear bar in the Communications Act against unlicensed broadcasting—a prohibition that this Court has expressly determined to be constitutional. As the court of appeals in this case correctly observed, "[p]ermitting Szoka or anyone else to operate without a license as a means of challenging" the FCC's low power broadcasting rules could cause the "very 'chaos' that, according to the Supreme Court, the broadcast licensing regime was designed to prevent." *Grid Radio*, 278 F.3d at 1321 (*quoting Red Lion*, 395 U.S. at 375-76). Pet. App. at A11.[7]

The court of appeals also correctly noted the course that Mr. Szoka should have taken if he wished to challenge the constitutionality of the FCC's former regulations setting certain minimum power levels for FM stations. Rather than engaging in unlicensed broadcasting in violation of the Communications Act, Mr. Szoka could have petitioned the FCC for a rulemaking seeking a change in the low power broadcasting rules, or applied for a waiver of the FCC's minimum power level requirements, and, if the Commission denied either request, then "challenged that denial in the appropriate circuit court." *Grid Radio*, 278 F.3d at 1321. Pet. App. at A12. In this manner, Mr. Szoka could have challenged the constitutionality of the FCC's former low power broadcasting rules, without violating federal law or threatening "the FCC's orderly allocation of scarce resources and the clear communication of current and future licensees." *Ruggiero v. Reno*, 200 F.3d at 65.

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[7] Other courts have agreed that unlicensed microbroadcasting "threatens the FCC's orderly allocation of scarce resources and the clear communication of current and future licensees." *Ruggiero v. Reno*, 200 F.3d at 65 (affirming grant of injunction prohibiting a low power radio station from broadcasting without a license, concluding that the government "sufficiently showed irreparable harm" warranting grant of the injunction "simply by establishing that plaintiffs were broadcasting without a license").

Moreover, NAB observes that, even if the FCC's previous FM power level requirements had been properly challenged in court and had been invalidated on some basis, Mr. Skoza would not even then have been entitled simply to start broadcasting. Assuming that a court decision had overturned the FCC's former minimum power level regulations, such a decision would only have entitled Mr. Szoka, along with any other interested parties, to submit to the Commission an application for a low power station license. And in order to receive a license, Mr. Szoka would have needed to satisfy the citizenship, character and other requirements necessary for FCC licensure, and prevail (under criteria established by the FCC) against any competing applicants who might have applied to operate a low power station on the same frequency as Mr. Szoka.[8] Thus, even a court decision invalidating the FCC's previous rules setting minimum power levels for FM stations would in no way have justified Mr. Szoka commencing broadcast operations without a license, nor automatically entitled Mr. Szoka to obtain a low power license.

This fact further distinguishes the instant case from the other licensing and permitting cases relied upon by

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[8] The Communications Act expressly provides that "[a]ll applicants for station licenses . . . shall set forth such facts as the Commission by regulation may prescribe as to the citizenship, character, and financial, technical, and other qualifications of the applicant to operate the station." 47 U.S.C. § 308(b). Pursuant to Section 308(b), the FCC requires applicants for all broadcast licenses to meet, *inter alia*, certain character qualifications. *See Character Qualifications*, 102 FCC 2d 1179 (1985), *recon. denied*, 1 FCC Rcd 421 (1986), *as modified*, 5 FCC Rcd 3252 (1990) and 7 FCC Rcd 6564 (1992). The FCC's character policies and reporting requirements focus on misconduct that violates the Communications Act or a Commission rule or policy and on specified types of non-FCC misconduct, including discrimination, making fraudulent statements to other governmental units, and felonies. All broadcast applicants are also required to certify that they are not subject to a denial of federal benefits under Section 5301 of the Anti-Drug Abuse Act of 1988, 21 U.S.C. § 862.

Petitioners. In those decisions involving nonbroadcast licensing, the parties would have been entitled to start "speaking" once the permitting scheme at issue was found constitutionally infirm.[9] As discussed in detail above, even a court decision invalidating the FCC's previous radio power level rules would have not entitled Mr. Szoka to simply start speaking (*i.e.*, broadcasting). The court of appeals therefore properly affirmed the FCC's order directing Mr. Szoka to cease his unlicensed broadcasting and imposing a monetary forfeiture, regardless of any allegations as to the constitutionality of the FCC's radio minimum power requirements.

IV. THE FCC'S PREVIOUS MINIMUM POWER REQUIREMENTS FOR FM RADIO DID NOT VIOLATE THE FIRST AMENDMENT.

As explained in Section III above, Mr. Szoka would not have been entitled to operate an unlicensed radio station even if the FCC's former regulations establishing minimum power levels for FM radio stations had been constitutionally infirm. But, contrary to Petitioners' claims, the FCC's previous rules requiring minimum power levels for FM stations did not violate the First Amendment, nor even raise any serious constitutional questions.[10]

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[9] For example, once this Court in *Lovell*, 303 U.S. 444, voided the city ordinance prohibiting the distribution of literature without a permit, the petitioner in that case would have automatically been entitled to "speak" (*i.e.*, distribute literature).

[10] Whether the FCC's previous low power broadcasting rules were unwise or inappropriate public policy is not at issue here. The Petition (at 18-22) raises only the constitutional claim. *See also NBC*, 319 U.S. at 224 (this Court stated that it was the "wrong forum" for pleas that FCC regulations were "unwise" or unlikely "to succeed in accomplishing what the Commission intended," as the Court had "neither technical competence nor legal authority to pronounce upon the wisdom" of any challenged regulations). Moreover, the fact that the Commission later changed its minimum power requirements and determined to license

This Court has generally held that the Commission possesses "broad authority" under the Communications Act to "allocate broadcast licenses." *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775, 795 (1978) (*NCCB*).[11] In *NCCB*, the Court rejected a First Amendment challenge to a Commission rule that barred the owners of newspapers from acquiring any broadcast stations in their communities. *Id.* at 798-802. This rule completely barred a specified class of speakers from engaging in radio or television broadcasting by either obtaining a license for a new station from the FCC or by acquiring an existing station, and thus had a far more preclusive effect than the FCC's rules establishing minimum power levels for FM radio stations. Since this Court has held that the FCC can constitutionally prevent some persons from engaging in radio or television broadcasting in their communities, *a fortiori*, it may constitutionally determine that the FM radio band will be

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certain low power stations does not in any way imply that the FCC's previous policy was *constitutionally* infirm. It only means that the FCC subsequently altered its view of how the public interest would be best furthered, and the Commission has ample authority under the Communications Act to modify its policy judgments. *See, e.g., Rainbow Broadcasting Co. v. FCC*, 949 F.2d 405 (D.C. Cir. 1991) (FCC acted within its authority in changing its broadcast licensing policy with regard to commercial and noncommercial television licensees, as agencies enjoy wide latitude when using rule makings to change their own policies and the manner by which their policies are implemented).

[11] *Accord United States v. Storer Broadcasting Co.*, 351 U.S. 192 (1956) (upholding the FCC's authority to establish initial eligibility standards for broadcast licensees). The courts have also consistently deferred to the Commission's broad discretion in the exercise of its authority regarding the allocation of spectrum, interference problems, and licensing decisions. *See, e.g., Regents of University System of Georgia v. Carroll*, 338 U.S. 586, 596 n.12 (1950); *American Radio Relay League, Inc. v. FCC*, 617 F.2d 875, 879 (D.C. Cir. 1980); *National Association of Regulatory Utility Commissioners v. FCC*, 525 F.2d 630, 636 (D.C. Cir. 1976).

restricted to licensed users broadcasting in accordance with specified operating conditions, such as minimum power levels.[12]

Despite the Petitioners' contention to the contrary (*see* Petition at 2), the courts of appeal that specifically addressed the constitutionality of the FCC's former low power broadcasting rules did not suggest that those rules likely raised any serious constitutional concerns. In *Prayze FM v. FCC*, the Second Circuit Court of Appeals concluded that the FCC would likely prevail in a constitutional challenge to the agency's policy to require FM stations to operate at certain minimum power levels. 214 F.3d 245, 252-53 (2nd Cir. 2000) (affirming district court's grant of preliminary injunction against an unlicensed low power FM station). Indeed, the court in *Prayze FM*, 214 F.3d at 252, explicitly rejected the claim by the unlicensed broadcaster that the FCC's low power broadcasting regulations were "not sufficient closely tailored" to pass constitutional muster—the same argument asserted by Petitioners here. *See* Petition at 19-20. The Sixth Circuit Court of Appeals similarly found little merit in the claims of an unlicensed microbroadcaster that the FCC's minimum power level requirements were "an unconstitutional prior restraint on speech." *U.S. v. Any and All Radio Station Transmission Equipment*, 204 F.3d at 666-67 (concluding that cases cited by an unlicensed broadcaster to support generalized First Amendment claims had nothing to do with "unlicensed radio broadcasting," and

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[12] *Accord NBC*, 319 U.S. at 226 (upholding against a First Amendment challenge a Commission determination to refuse to grant broadcast "licenses to persons who engage in specified network practices"); *Turro v. FCC*, 859 F.2d 1498, 1500 n.2 (D.C. Cir. 1988) (finding no First Amendment issues raised by FCC denial of a request for a waiver of its rule prohibiting low power "translator" stations, which rebroadcast the signals of full power stations, from originating their own local programming).

affirming the district court's refusal to grant the unlicensed broadcaster an injunction against a governmental forfeiture action).

These appellate courts correctly concluded that the FCC's previous rules setting minimum power levels for FM stations should likely survive any First Amendment challenge. Assuming *arguendo* that, to pass constitutional muster, the low power radio rules should have been "narrowly tailored to further a substantial governmental interest," *FCC v. League of Women Voters of California*, 468 U.S. 364, 380 (1984), the FCC's former rules would easily meet this "intermediate" standard of review.[13] Without question, the maintenance of a system of radio broadcasting free from debilitating interference constitutes a substantial governmental interest. *Prayze FM*, 214 F.3d at 252-53 (citing "the substantial government interest in allowing" broadcasters "to operate free of interference"). *See also FCC v. Sanders*, 309 U.S. at 474 (the allocation and regulation of radio frequencies were needed to prevent "confusion and interference," which would "deprive[] the public of the full benefit of radio audition"). Indeed, Petitioners do not attempt to dispute the substantiality of the governmental interest.

The FCC's former low power broadcasting rules were, moreover, "sufficiently closely tailored" to "further this substantial government interest." *Prayze FM*, 214 F.3d at 252. NAB emphasizes that "a regulation need not be the least

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[13] And since rules requiring minimum power levels for FM stations are both content neutral and technical in nature (rather than directly speech-related as the "anti-editorializing" rule at issue in *League of Women Voters*), they should arguably be reviewed under only a "rational basis" test, and upheld if they bear a *reasonable* relation to a legitimate governmental purpose. *See NCCB*, 436 U.S. at 802 (even though the rule at issue barred a specified class of persons from engaging in either radio or television broadcasting in their communities, this Court upheld the rule as a "reasonable means of promoting the public interest in diversified mass communications").

speech-restrictive means of advancing the Government's interests" to satisfy the "narrow tailoring" standard. *Turner*, 512 U.S. at 662. Rather, the narrow tailoring requirement would be satisfied in this case if the government's substantial interest in interference free FM broadcasting would have been "achieved less effectively absent" the FCC's policy. *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989).

An examination of relevant FCC orders shows that the Commission acted with due consideration, and carefully addressed the arguments for and against mandatory minimum power levels before concluding that its interest in preventing "destructive interference" would be most effectively served by retaining minimum power requirements for FM stations.[14] As the Commission explained in detail, a low power FM station could operate at a distance from a high power station without destructive interference to the low power station's signal because the high power station's signal would be weakened with distance. However, the Commission found this "unacceptable from a public interest standpoint because the lower power station would cause objectionable interference to the reception by the audience of the primary station's signal." *Dunifer*, 11 FCC Rcd at 724. The Commission believed that "[s]uch interference to the primary station *could be difficult to identify and correct, and would serve to lower the quality of the FM broadcasting service.*" *Id.* (emphasis added). Thus, the Commission was entitled to conclude that general rules requiring FM stations to operate at certain minimum power levels and at specified minimum distance separations would "achieve[]" its "substantial" interest in interference-free broadcasting more "effectively"

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[14] *Memorandum Opinion and Order, In re Stephen Paul Dunifer*, 11 FCC Rcd 718, 721-26 (1995) (*Dunifer*) (summarizing the earlier notice and comment rulemaking proceedings where arguments relating to low power FM broadcasting had been thoroughly addressed, and further discussing reasons supporting the FCC's policy).

than, for example, a policy of accepting any and all applications for low power stations, and then attempting to evaluate them on a case-by-case basis depending upon the level of *predicted* interference in each individual application. *Ward v. Rock*, 491 U.S. at 799.[15]

To insure a lack of objectionable interference in the FM band and to promote more efficient use of the radio spectrum, the Commission has further explained that stations must be precluded from operating on the same (or even adjacent) channels over a considerable geographic area, as demonstrated by the following example:

> A 10 watt station with a 100 meter antenna has a service radius of 5.9 kilometers and a service area of 109 square kilometers. To protect this hypothetical low power station from interference by a co-channel Class A FM station operating at 6 kilowatts, we would need to preclude the establishment of that Class A station within a distance of 92.6 kilometers from the transmitter for the low power station. In contrast, one Class A station would preclude another co-channel Class A station within a distance of 115 kilometers. A Class A station, however, operating at 6 kilowatts with a 100 meter antenna has a service radius of 28.3 kilometers and a service area of 2,516 kilometers. Therefore, while the preclusive effect of a Class A station is 24 percent

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[15] Certainly the adoption of general regulations setting minimum power levels and distance separations for all stations would be more efficient for the Commission to administer and would consume less administrative resources. And despite the Commission's general rule against operating below specified power levels, any prospective FM applicant would have been entitled to request a waiver of that rule, which the Commission was required to give the requisite "hard look." *WAIT Radio v. FCC*, 418 F.2d 1153, 1159-60 (D.C. Cir. 1969). *See Prayze FM*, 214 F.3d at 253 (noting the "existence of the waiver provision" as a factor in concluding that the FCC's low power broadcasting rules would likely pass constitutional muster).

> greater than the 10 watt station . . . , the service radius of a Class A station is *almost 500% greater* than the smaller station . . . . If we treat preclusion as a cost and service as a benefit, the cost/benefit ratio improves with power; *but the ratio is very poor for low powered stations.*[16]

Given the need to "avoid destructive interference" and the significant "preclusion" that the existence of low power stations would have on the establishment of full power stations, *Dunifer*, 11 FCC Rcd at 725, the Commission's former rules setting minimum power levels for FM radio stations cannot be regarded as insufficiently narrowly tailored under an intermediate level of First Amendment review.

Beyond these significant interference concerns, the Commission has additionally explained that, due to the preclusive effect of low power stations detailed above, high power broadcast facilities "are more spectrally efficient" and can "serve communities and mobile audiences" better than low power stations. *Id.* at 724-25. Contrary to Petitioners' claims that the FCC's previous power level requirements "gratuitously wast[ed] spectrum" (Petition at 20), the Commission clearly had a legitimate basis for concluding that its previous policy actually made *more* efficient use of the limited spectrum resource. *See id.* at 725 (the licensing of low power stations in any given region "would lead to a larger number of stations, but less overall service" within the region, due to "multiple interfering signals"). In any event, Petitioners have no basis for asserting that the FCC's former policy judgments about the efficient use of radio spectrum—even if arguably

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[16] *Dunifer*, 11 FCC Rcd at 725 (emphasis added). A "Class A" FM station was, at that time, the lowest-powered class of FM stations for which the FCC would grant new licenses. "Co-channel" stations are ones that operate on the same channel. A station's "service area" is simply the geographic area where its signal reaches listeners.

"unwise" or unlikely "to succeed in accomplishing what the Commission intended"—were somehow *constitutionally* infirm. *NBC*, 319 U.S. at 224.

Finally, regardless of any arguments about the constitutionality of the FCC's *former* regulations establishing minimum power levels for FM stations, those rules are no longer in force. As noted in the Petition (at 5-6), the Commission in 2000 altered its power level requirements, and determined to issue licenses for low power FM stations. *Report and Order, Creation of Low Power Radio Service*, 15 FCC Rcd 2205 (2000). Congress subsequently acted to determine by statute the extent to which low power radio stations may be licensed. *See* Radio Broadcasting Preservation Act of 2000, Pub. L. No. 106-553, 114 Stat. 2762, App. B., § 632 (due to interference concerns, Congress required the Commission to maintain minimum distance separations between stations operating on adjacent channels, thereby reducing the number of low power stations that can be licensed). In light of recent Commission and Congressional action supplanting the FCC's former rules requiring FM radio stations to operate at certain minimum power levels, there is no reason for this Court now to review those rules. Agency regulations that no longer exist certainly do not warrant this Court's time and attention.

CONCLUSION

Because, for the foregoing reasons, Petitioners have failed to identify any circumstances warranting further review, respondent National Association of Broadcasters urges the Court to deny the petition for a writ of certiorari.

Respectfully submitted,

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In The

Supreme Court of the United States

GRID RADIO and JERRY SZOKA,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,

Respondents.

On Petition for Writ Of Certiorari To The
United States Court Of Appeals
For The D.C. Circuit

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

I. RESPONDENTS HAVE ABANDONED THE HOLDING OF THE COURT BELOW.

The respondents do not, and cannot, defend the essential holding of the Court of Appeals: that a licensing scheme's unconstitutionality must be "indisputably clear" under prior Supreme Court decisions before a speaker may rely on its unconstitutionality as a defense against large fines and other punishment for speaking without a license. As we noted in the Petition, that holding squarely conflicts with this Court's decisions and the decisions of other circuit courts. *See* Pet. at 14-18. The respondents never even attempt to defend this assertion, although it is the essential premise of the D.C. Circuit's ruling in their favor.

II. RESPONDENTS' OWN ARGUMENTS ARE MERITLESS.

Instead, respondents attempt to provide alternative rationales for the result reached by the Court of Appeals. All of these rationalizations fail on their own terms. Furthermore, since the D.C. Circuit will no doubt follow its own rationale (and not respondents') in future cases, these rationales do not provide any good reason to deny the petition.

A. First, respondents attempt to rely on an even more radical proposition: that irrespective of a licensing scheme's unconstitutionality, a speaker cannot rely on its unconstitutionality as a defense at all, if it involves broadcast speech. National Association of Broadcasters Brief ("NAB Br.") at 4-7; Brief for the Federal Respondents ("FCC Br.") at 9-12. They believe this radical result follows naturally from the settled rule that there is

no right to broadcast without a license. They are wrong.

When there are fewer opportunities for speech than there are speakers, a licensing scheme is needed to provide a fair means of allocating scarce opportunities for speech. Thus, there is no First Amendment right to hold a rally in a public park without a license, *Thomas v. Chicago Park District*, 122 S. Ct. 775 (2002), to parade in a public street without a license, *Cox v. New Hampshire*, 312 U.S. 569, 576-77 (1941), or to broadcast without a license, *National Broadcasting Co. v. United States*, 319 U.S. 190 (1943), because opportunities for speech in these fora are inherently limited. But that does not mean that unlicensed speech or broadcasts can be punished when the licensing scheme itself is unconstitutional. As the court below conceded, "the Constitution permits a person faced with an unconstitutional licensing law to 'ignore it and engage with impunity in the exercise of the right of free expression for which the law purports to require a license.'" *Grid Radio v. FCC*, 278 F.3d 1314, 1320 (Pet. App. A9), *quoting Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 151 (1969). As we previously noted, the unconstitutionality of a licensing scheme has always been a defense to its enforcement. Pet. 15-16 (citing cases).

The respondents argue that even if the microbroadcasting ban is unconstitutional, any challenge to its enforcement is foreclosed by the observation in *National Broadcasting Co. v. United States*, 319 U.S. 190, 227 (1943), that the "right of free speech does not include . . . the right to use the facilities of radio without a license." But this observation only meant that the licensing of broadcasters under the Communications Act is not *per se* unconstitutional, not that unlicensed speakers can be punished under unconstitutional FCC regulations. The Court

said this only after rejecting every other statutory and constitutional objection to the regulations, in response to the argument that "[t]he [FCC's chain broadcasting] Regulations, *even if valid in all other respects*," violated the First Amendment because "every person whose application for a license to operate a station is denied by the commission is thereby denied his constitutional right to free speech." *Id.* at 227 (emphasis added).

While *National Broadcasting* upheld the validity of requiring a license to broadcast, the Court rejected the premise that the lack of a license prevents a broadcaster from challenging an unreasonable licensing restriction: "Congress did not authorize the Commission to choose among applicants upon the basis of their political, economic, or social views, or upon any other capricious basis. If it did, or if the Commission by these regulations proposed a choice among applicants upon such a basis, the issue before us would be wholly different." *Id.* The micro-broadcasting ban petitioners challenge in this case is an example of just the sort of arbitrary regulation condemned in *National Broadcasting*. It denied licenses to small broadcasters based on their size, even though doing so left unnecessary gaps in the electromagnetic spectrum too small to be used by full-power broadcasters. That wasted spectrum, and violated the FCC's duty under the First Amendment to make the spectrum available for speech.

Under the respondents' construction of *National Broadcasting*, no denial of licenses, no matter how arbitrary -- for example, excluding all African American or Democratic applicants -- would be subject to challenge in an enforcement proceeding. Not surprisingly, even the court below rejected that view.

Respondents claim that allowing unlicensed broadcasters to challenge enforcement of unconstitutional regulations will lead to chaos. NAB Br. 10; FCC Br. 5. This defies common sense. *See* Pet. 16. Chaos would not ensue, because most people are not willing to risk the punishment that would be imposed if their view of the Constitution turns out to be wrong. Moreover, unlicensed demonstrations are much more likely to cause disorder than broadcasts, *see, e.g.*, Jim Brunner, *$9.3 Million Bill from WTO Bound to Swell with Claims Against City*, Seattle Times, June 25, 2000 ($20 million in damage from anti-WTO demonstrations); *Cox*, 312 U.S. at 576 (licensing is needed "to prevent confusion by overlapping parades or processions, to secure convenient use of the streets by other travelers, and to minimize the risk of disorder"), yet the law is clear that unlicensed demonstrators can raise constitutional defenses to licensing schemes. *See Shuttlesworth, supra.*

B. In our petition, we cited a long line of cases from this Court holding that unlicensed speakers can challenge the constitutionality of licensing schemes as a defense to prosecution. Pet. 15-16. The FCC argues that these cases are distinguishable, because they involved a "First Amendment right to speak without a license," FCC Br. 10, which does not exist in broadcasting. But none of the cases on which we relied said there was a First Amendment right to speak without a license. Quite the contrary. *Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 755 (1988) (cited at Pet. 16), said that an unlicensed speaker could challenge a licensing scheme even if the licensed speech could be entirely prohibited. *Id.* at 762-63 (even if a total ban on newsracks would be valid, the challenged news rack licensing scheme would nevertheless remain unconstitutional). Rejecting the right to speak

without a license, it observed that "[o]f course, the city may require periodic licensing, and may have special licensing procedures for conduct commonly associated with expression." *Lakewood*, 486 U.S. at 760. Far from holding there is a right to speak without a license, the other decisions we cited stand for the principle that licensing schemes are permissible when they contain "narrow, objective, and definite standards to guide the licensing authority." *Shuttlesworth*, 394 U.S. at 150-51 (1969), *citing Lovell v. Griffin*, 303 U.S. 444 (1938), *Schneider v. State*, 308 U.S. 147, 163-65 (1939), *Staub v. Baxley*, 355 U.S. 313 (1958). *See* Pet. 15 (citing these cases).

The NAB argues that cases outside the broadcasting context are "inapposite" in a broadcast case such as this one, since the right to broadcast, unlike the right "to speak, write, or publish," is not "unbridgeable [sic]." NAB Brief at 7. But broadcast speech is not unique in being subject to more regulation than ordinary speech. So, too, are the parades and picketing that was involved in the cases we cited, such as *Shuttlesworth*, which overturned convictions for violating a parade licensing scheme. *Shuttlesworth* conceded that "'the First and Fourteenth Amendments [do not] afford the same kind of freedom to those who would communicate ideas by conduct such as patrolling, marching, and picketing in the streets and highways, as those amendments afford to those who communicate ideas by pure speech.'" 394 U.S. at 152, *quoting Cox v. Louisiana*, 379 U.S. 536, 555 (1964). Yet it held that, in even in this highly regulated context, a person faced with "an unconstitutional licensing law may ignore it and engage with impunity in the exercise of the right of free expression for which the law purports to require a license." *Shuttlesworth*, 394 U.S. at 151.

In short, the fact that the Constitution may permit more regulation of broadcasters than other speakers is no reason to insulate broadcast speech restrictions from scrutiny when they are in fact unconstitutional. This Court has allowed other highly-regulated speakers to rely on the unconstitutionality of licensing schemes as a defense to prosecution, even when they operate without a license. For example, *Freedman v. Maryland*, 380 U.S. 51 (1965), overturned a movie theater operator's conviction for showing an unauthorized movie, even though the defendant had not attempted to obtain a permit for it, since the licensing scheme was unconstitutional. It did so even though the Court had earlier upheld a licensing requirement for movies that would have been invalid in other contexts. *Times Film Corp. v. City of Chicago*, 365 U.S. 43, 49 (1961) (upholding requirement that all movies be reviewed by a board of censors prior to their exhibition, and observing that movie theaters had a potentially greater "capacity for evil" in widely disseminating obscene matter, which justified a greater "scope of community control," and prevented movies from being "subject to the precise rules governing" other kinds of speech). But the heightened regulation of movie theaters did not prevent the *Freedman* defendant from operating without a license and then relying on the licensing law's unconstitutionality as a defense. An unlicensed speaker, the Court held, could challenge the licensing law regardless of "whether or not his conduct could be proscribed by a properly drawn statute, and whether or not he applied for a license." *Freedman*, 380 U.S. at 56.

C. Respondents argue that the microbroadcasting ban is narrowly tailored to preventing interference. NAB Br. 15-16; FCC Br. 11-12. But they cannot dispute that the microbroadcasting ban gratuitously wasted spectrum. Since a microbroadcaster can fit in a gap in the

electromagnetic spectrum that is too small to fit a regular broadcaster, there is space in the electromagnetic spectrum to accommodate thousands of microbroadcasting stations, without interfering with the signals of other radio stations, as the FCC itself has conceded. *See* Pet. 19-20.

The fact that a given area might sometimes be more efficiently served by a single full-power station than by many microbroadcasters, as the NAB argues, NAB Br. 17-18, *citing In re Dunifer*, 11 FCC Rcd 718, 724 (1995), is no reason to preclude a microbroadcaster from operating in gaps in the spectrum between full-power stations that are simply too small to accommodate an additional full-power station. We have never argued that the FCC should replace existing full-power stations with microbroadcasters, or stop issuing full-power licenses, only that it should not have banned microbroadcasters -- especially where only they can fill a gap in the spectrum.[1]

The NAB's arguments for upholding the ban are contradictory. First, it claims that a ban is narrowly-tailored because it would be too difficult to evaluate microbroadcasting applications on a case-by-case basis. NAB Br. 17. Then, it argues that the ban is narrowly-tailored because the FCC is empowered to grant waivers of the ban. NAB Br. 17 n.15. *See also* FCC Br. 3-4.

The first argument provides no justification for

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[1] *See also Creation of a Low-Power FM Radio Service*, 15 FCC Rcd 2205, 2211 (¶ 11) (2000) (Report and Order) (microradio stations operating at 10 watts "can be sited" in gaps in the spectrum where higher-power, 100 watt stations cannot fit). Moreover, microradio stations can operate provisionally where there is not yet a market sufficient to sustain a full-power radio station. *See id.* at 2231 (¶ 65).

discriminating against micro-broadcasters. The NAB does not claim that evaluating the potential interference of microbroadcasters is any harder than evaluating the potential interference of full-power broadcasters. The FCC is perfectly capable of adopting general rules (as it ultimately did) that obviate the need for evaluating interference on a case-by-case basis by using minimum distance separation methods similar to those it uses for full-power broadcasters. *See Creation of a Low-Power FM Radio Service*, 14 FCC Rcd 2471, 2482 n.40 (1999) (Notice of Proposed Rulemaking); *Creation of a Low-Power FM Radio Service*, 15 FCC Rcd 2205, 2233-34 ¶ 70 (2000) (Report and Order).

The second argument is conspicuously inconsistent (once again) with the decision of the court below, which NAB purports to defend. NAB instead relies on *Prayze FM v. FCC*, 214 F.3d 245 (2d Cir. 2000), which denied a preliminary injunction against the microbroadcasting ban, reasoning that it might very well meet the constitutional requirement of "narrow tailoring" because microbroadcasters could always seek a waiver of the ban when its application was unnecessary. *Id.* at 253 (citing the "existence of the waiver provision"). *Prayze* was mistaken in suggesting that there are exceptions to the ban. The court below pointed out that seeking a waiver is futile: despite an enormous amount of speakers seeking to operate a microradio station, the FCC has always denied waivers, except once to a remote Navajo-speaking community in New Mexico. *Grid Radio*, 278 F.3d at 1319 (Pet. App. A9); *see also* C.A. App. 153-158 (showing denials of waiver requests); C.A. App. 159 ("The Commission receives thousands of inquiries (well over 13,000 per year!) from individuals and groups wishing to start a 'low power' or 'micro power' radio station"). A speech restriction's

overbreadth cannot be cured by a single isolated exception in over two decades.

Curiously, the FCC never explains why it thinks a blanket ban on microbroadcasters was narrowly-tailored to preventing interference. It just recites the fact that the FCC believes that it was narrowly-tailored. FCC Br. 11. Of course, the fact that an agency thinks its own regulation is constitutional is not binding on this Court, which has an independent duty to decide constitutional questions.[2]

CONCLUSION

For these reasons, and those stated in the Petition, this Court should grant the petition for certiorari.

Respectfully submitted,

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[2] *See Sable Communications v. FCC*, 492 U.S. 115, 129 (1989). The FCC also cites three decisions it describes as "upholding enforcement orders preventing microbroadcasters from broadcasting without a license," FCC Br. 12 n.6. But these rulings are irrelevant, since they turned on a lack of jurisdiction, not the First Amendment. *See United States v. Szoka*, 260 F.3d 516 (6th Cir. 2001) (holding that only the D.C. Circuit could hear Szoka's challenge); *United States v. Neset*, 235 F.3d 415 (8th Cir. 2000) (trial court lacked jurisdiction); *United States v. Dunifer*, 219 F.3d 1004 (9th Cir. 2000) (same).